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HANDBOOK

ON THE

LAW OF PERSONS AND DOMESTIC RELATIONS

BY
WALTER C. TIFFANY

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PREFACE.

In this book the same general plan has been followed as that adopted in the previous books of the Hornbook Series. A concise statement of the law precedes each subdivision of the subject, and is followed and illustrated by a fuller treatment in the subsidiary text.

The common law of the domestic relations, particularly the law of husband and wife, has been to a great extent modified by statutes, and in some states almost entirely superseded. These statutory changes have been by no means uniform, and there are probably few branches of the law in which there is to-day less uniformity. In a book of this scope it would be impossible to give in detail the law of each state as modified by statute. Since the common law is still in force excepting so far as changed by statute, a knowledge of the common, as well as of the statute, law, is necessary, in order to determine what the law is to-day. The plan followed has been, therefore, to state the common-law rule, and then the substance of such statutes as have been generally adopted, with the interpretation of such enactments by the courts, leaving it to the reader to ascertain what statutes are peculiar to his own state.

The original scope of this book was limited to the subjects of Husband and Wife, Parent and Child, Infancy, and Guardian and Ward; but it has been thought advisable to add Master and Servant, Persons Non Compotes Mentis, and Aliens, and these additions are the work of Mr. William L. Clark, Jr. I am further under great obligations to Mr. Clark for valuable assistance in other parts of the book.

W. C. T.

Minneapolis, Minn., Sept. 5, 1896.

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PART I.

HUSBAND AND WIFE.

HANDBOOK

ON

THE LAW OF PERSONS AND DOMESTIC RELATIONS.

CHAPTER I.

MARRIAGE.

- 1-3. Definition of Marriage.
- 4. Essentials of Marriage—Classification.
- 5. Mutual Consent.
- 6-10. Reality of Consent.
 - 7. Fraud.
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- 22-26. Annulment and Avoidance of Marriages.
 - 27. Power of Legislature to Validate Marriage.
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 - 30. Conflict of Laws.

DEFINITION OF MARRIAGE.

1. The term "marriage" is used in two senses:
 - (a) To designate the relation of a man and a woman legally united for life as husband and wife.
 - (b) To designate the act, as distinguished from the executory agreement to marry, by which the parties enter into the marriage relation.
2. Marriage, in the sense of the relation of husband and wife, is a status, and not a contract.
3. Marriage, in the sense of the act by which the parties become husband and wife, has been called a contract, but, strictly speaking, it is not so; it is the performance of their contract to marry, resulting in a change of status.

Unfortunately, the term "marriage" has been used in two senses, and this double use of the term has resulted in some confusion. In one sense, it means the marriage relation; that is, the status of a man and woman legally united as husband and wife. In another sense, it means the act or ceremony by which that relation is assumed, as distinguished from the executory contract to marry. It is used in the first sense when it is said that a marriage has been dissolved, and in the second sense when it is said that a marriage has been celebrated, or has been proved.

Marriage as a Contract.

It is said by most of the text writers, and it has often been said by the judges, that marriage is a "civil contract";¹ but this is not true. Strictly speaking, marriage is not a contract, in either of the senses in which the term is used.² The question has arisen in a

¹ Johnson v. Johnson's Adm'r, 30 Mo. 72; Fornshill v. Murray, 1 Bland, Ch. (Md.) 479; McKinney v. Clarke, 2 Swan (Tenn.) 321; Barkshire v. State, 7 Ind. 389.

² Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723; Sottomayer v. De Barros, 5 Prob. Div. 94; Adams v. Palmer, 51 Me. 481; Ditson v. Ditson, 4 R. I. 87; Wade v. Kalbfleisch, 58 N. Y. 282; Moot v. Moot, 37 Hun, 288; Watkins v. Watkins, 135 Mass. 83; Maguire v. Maguire, 7 Dana (Ky.) 181; Green v. State,

number of cases where the legislature has undertaken to grant divorces, or to change the rights of parties who have married. It has been contended that such acts of the legislature are unconstitutional, because they impair the obligation of contracts; but the courts have held that marriage is not a contract, within the meaning of this clause of the constitution.³ These decisions not only hold that the marriage relation is not a contract, but they necessarily hold that the ceremony of marriage is not a contract, for a statute that would impair the obligations of the former would necessarily impair the obligations of the latter. That neither marriage, nor the marriage relation, is a contract, would seem obvious when the differences between them are noticed. In a contract the parties fix its terms, but marriage imposes its own terms. A contract may be terminated by mutual consent, but the marriage relation cannot be so terminated. An agreement to marry is necessary to a valid marriage, but when that agreement is carried out, by marrying, a relation is created between the parties which they cannot change. Unlike a contract, also, the marriage relation cannot necessarily be terminated, even though one of the parties becomes incapable of performing his part; nor can it be terminated by an infant of marriageable age.⁴ In these and many other respects it is irreconcilable with ideas of contract.

Confusion has arisen from confounding the contract to marry with the execution or performance of that contract, and with the relation that results from such performance. Where parties mutually agree to marry at some future time, there is a contract to marry. When they marry,—that is, when they express their mutual consent with the formalities required by law, or when they informally assume the relation,—they do not contract, but they perform their contract to marry, just as a conveyance of land, and payment therefor, is a performance of a previous contract to convey, on the one side, and to pay, on the other. When the contract to marry is performed by marriage, a relation or status, not a contract, results.

58 Ala. 190; *Noel v. Ewing*, 9 Ind. 37; *Magee v. Young*, 40 Miss. 164. This question may be a very important one. See post, pp. 140, 208.

³ See the cases cited above.

⁴ Post, p. 18.

Agreement is necessary to a valid marriage, and it is for this reason, no doubt, that writers and judges have spoken of it as a contract. But it must be remembered that something more than agreement is necessary to constitute a contract. The agreement must directly, and not remotely, contemplate and create a personal obligation, an obligation in personam, capable of enforcement by the courts in an action by one of the parties against the other. Marriage neither directly contemplates nor creates such an obligation.⁵ It is otherwise, of course, with an agreement to marry. These considerations make it clear that marriage cannot, in either sense of the term, be regarded as a contract. The marriage relation is a status, and marriage is a change of status.

"Marriage has been well said to be something more than a contract, either religious or civil; to be an institution."⁶ "Marriage is a state or relation, depending for its existence upon the fact of parties competent to contract the relation, and their legal voluntary, present consent to do so, with such formalities as the law of the place requires for its valid solemnization."⁷ "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest, not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties, as to its extent or duration, is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties."⁸ "Marriage is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can

⁵ See Anson, Cont. 3; Clark, Cont. 12.

⁶ Hyde v. Hyde, L. R. 1 Prob. & Div. 130, 133.

⁷ Story, Confl. Laws, § 112a.

⁸ Adams v. Palmer, 51 Me. 481, 483.

make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."⁹

In many of the states the legislature has undertaken to define marriage as a "civil contract"; but this is for the purpose of conveying the idea that mutual consent of the parties is essential, or that mutual consent alone, without formal celebration, is sufficient to constitute marriage, or for the purpose of emphasizing the fact that marriage is a civil, and not a religious, institution.¹⁰ Such a statute cannot have the effect of making marriage a true contract.

ESSENTIALS OF MARRIAGE—CLASSIFICATION.

4. The essentials of a valid marriage may be classified and treated as follows:
 - (a) Mutual consent, or agreement, under which head may be treated
 - (1) Intention generally.
 - (2) Reality of consent, or consent as affected by fraud, duress, or error.
 - (b) Parties capable of intelligent consent, under which head may be treated
 - (1) Insanity and intoxication.
 - (2) Nonage.
 - (c) Parties otherwise capable of entering into the marriage relation, under which may be treated the effect of
 - (1) Relationship between the parties,—consanguinity or affinity.
 - (2) Physical incapacity.
 - (3) Civil conditions.
 - (4) Prior marriage.
 - (d) Formalities in the celebration of marriage, under which head may be treated informal marriages.

⁹ *Ditson v. Ditson*, 4 R. I. 87, 101.

¹⁰ See *Fornhill v. Murray*, 1 Bland, Ch. (Md.) 479.

While marriage, in the sense of the act or ceremony by which the relation of husband and wife is assumed, is no more a real contract than is the relation itself, still mutual consent or agreement is necessary, and this fact clothes marriage with a semblance of contract. Marriage and contract have the element of agreement in common, and anything that would exclude this element in contract would also exclude it in marriage. There are many principles, therefore, of the law of contract, that apply also in the case of marriage. The necessity for mutual consent, including the question of reality of consent, or consent as affected by fraud, duress, or mistake, gives rise to rules which are also applicable to the formation of contract. So, also, with the question of insanity or intoxication. But marriage also involves other essentials which have no place in the law of contract. Thus the parties must be physically capable; they must not be related to each other within the degrees within which marriage is prohibited; there must be no impediment of civil condition; and the parties must not be bound by a prior marriage. In some jurisdictions, also, certain formalities are prescribed by law, to be observed in the celebration of marriage; and, if such is the intent of the law, these formalities must be complied with. Contracts by an infant are voidable, but an infant of a certain age may enter into a marriage that will be absolutely binding on him. It will be seen, therefore, that the essentials of marriage differ widely from the essentials of contract.

MUTUAL CONSENT.

5. To constitute a valid marriage, there must be agreement or mutual consent to enter into the marriage relation.

One of the elements common to both contract and marriage is the agreement or mutual consent of the parties. Though the marriage relation is an institution over which, when it has been entered into, the parties have little control, yet it lies entirely with them whether they shall assume that relation. Their agreement or mutual consent, therefore, is essential, and anything that goes to show that there was no real agreement shows that there was no valid mar-

riage.¹¹ In *McClurg v. Terry*¹² it appeared that a man and woman having capacity to enter into the marriage relation went through the formalities required by law, and were pronounced man and wife by a person who was authorized to perform the marriage ceremony. The parties, however, took this step merely as a joke—not intending it to be a marriage—and it was therefore held that there was no valid marriage.

REALITY OF CONSENT—FRAUD, DURESS, AND ERROR.

6. The mutual consent which is essential to a valid marriage must be real. There may be no real consent, because of
 - (a) Fraud.
 - (b) Duress.
 - (c) Error.
7. **FRAUD**—A marriage is not invalidated by false representations as to rank, fortune, character, or health; nor by false representations as to chastity, except where the woman was pregnant by another man at the time of the marriage, and the husband was ignorant of the fact, and had not himself had intercourse with her. Deceit may invalidate a marriage, if it prevented the other party from understanding its nature, as in cases where advantage is taken by one party of the extreme youth or age of the other.
8. **DURESS**—A marriage is voidable if either party acted under duress.
9. **ERROR**—Error as to the identity of the other party renders the marriage voidable, but a marriage is not invalidated by an error as to his or her rank, fortune, character, or health.

¹¹ *McClurg v. Terry*, 21 N. J. Eq. 225; *Clark v. Field*, 13 Vt. 460, 465; *Roszel v. Roszel*, 73 Mich. 133, 40 N. W. 858; *State v. Worthingham*, 23 Minn. 528; *Rundle v. Pegram*, 49 Miss. 751.

¹² 21 N. J. Eq. 225.

10. A marriage is voidable on the ground of fraud, duress, or error, and not absolutely void; but it is voidable by act of the party, without the necessity for a decree of nullity. It can be avoided only by the party deceived, coerced, or mistaken.

False representations as to rank, fortune, character, or health do not invalidate a marriage.¹³ Whether this is because these qualities are not essentials of marriage;¹⁴ or because the law presumes the exercise of due caution in a matter of such importance, and that these conditions are waived by marrying;¹⁵ or because of grounds of public policy,—the cases are almost uniform in holding that fraudulent representations in these particulars cannot be relied upon to defeat an otherwise valid marriage. The cases go so far as to hold that false representations as to previous chastity are not ground for annulling a marriage, even though the woman may have been a common prostitute.¹⁶ When, however, the woman is pregnant by another man at the time of the marriage, the marriage is voidable.¹⁷ The courts have placed their decision, where

¹³ *Ewing v. Wheatley*, 2 Hagg. Ecc. 175; *Wakefield v. Mackay*, 1 Hagg. Consist. 394; *Wier v. Still*, 31 Iowa, 107; *Carris v. Carris*, 24 N. J. Eq. 516; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Leavitt v. Leavitt*, 13 Mich. 456; *Long v. Long*, 77 N. C. 304; *Scroggins v. Scroggins*, 3 Dev. (N. C.) 535; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323; *Fisk v. Fisk* (Super. Ct.) 34 N. Y. Supp. 33. Contra, *Keyes v. Keyes*, 6 Misc. Rep. 355, 26 N. Y. Supp. 910. In the latter case a man had represented himself to be honest and industrious, whereas he was in fact a professional thief, whose picture was in the rogue's gallery; and the marriage was annulled on the ground of fraud. This case, however, is against the weight of authority. See *Wier v. Still*, and other cases cited above. In *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, it was held that a marriage is not voidable for fraud for concealment of the fact that the wife was at the time a kleptomaniac.

¹⁴ 1 *Fraser*, Dom. Rel. 230; 1 *Kent*, Comm. 77.

¹⁵ 1 *Bish. Mar., Div. & Sep.* § 460; *Wakefield v. Mackay*, 1 Hagg. Consist. 394.

¹⁶ *Hedden v. Hedden*, 21 N. J. Eq. 61; *Farr v. Farr*, 2 *McArthur*, 35; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Leavitt v. Leavitt*, 13 Mich. 452; *Wier v. Still*, 31 Iowa, 107.

¹⁷ *Scott v. Schufeldt*, 5 *Paige* (N. Y.) 43; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Donovan v. Donovan*, 9 Allen (Mass.) 140; *Baker v. Baker*, 13 Cal. 87; *Montgomery v. Montgomery*, 3 *Barb. Ch.* (N. Y.) 132; *Allen's Appeal*,

the case has arisen, on the ground that the ability to bear the husband a child of his loins is an essential of marriage, and that a pregnant woman is not able to carry out the agreement in this essential particular.¹⁸ In order that the husband may be entitled to avoid the marriage on the ground of the wife's pregnancy by another man at the time of the marriage, he must have been ignorant of the fact; for otherwise there is no fraud, nor failure to consent.¹⁹ Express denials by the woman, or overt acts of concealment, are not necessary. It is sufficient if her conduct was such that a reasonably cautious person might be misled.²⁰ If the husband had himself had antenuptial connection with the wife, he must be regarded as having been put upon his guard as to her chastity, and he will not be permitted to say that he was ignorant of her pregnancy by another man at the time of the marriage.²¹

When consent is obtained by deceit, under such circumstances that the nature of the marriage is not understood, the marriage may be avoided. Such cases arise where one of the parties takes advantage of the extreme youth or age of the other.²²

A marriage under duress or compulsion is without the consent

99 Pa. St. 196; *Carris v. Carris*, 24 N. J. Eq. 516; *Ritter v. Ritter*, 5 Blackf. (Ind.) 81; *Frith v. Frith*, 18 Ga. 273; *Harrison v. Harrison*, 94 Mich. 559, 54 N. W. 275. See *Long v. Long*, 77 N. C. 304.

¹⁸ In 1 Bish. Mar., Div. & Sep. § 486, the author has pointed out that this is inconsistent with the position taken by the courts in considering the disability of impotence, where the law is settled that copula, not fruitfulness, is the test, and that barrenness is no ground for nullity. Post, p. 24.

¹⁹ *Foss v. Foss*, 12 Allen (Mass.) 26; *Crehore v. Crehore*, 97 Mass. 330; *Butler v. Eschleman*, 18 Ill. 44; *Berry v. Bakeman*, 44 Me. 164. And see *Steele v. Steele* (Ky.) 29 S. W. 17.

²⁰ *Donovan v. Donovan*, 9 Allen (Mass.) 140.

²¹ *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. 376; *Crehore v. Crehore*, 97 Mass. 330; *Foss v. Foss*, 12 Allen (Mass.) 26; *Franke v. Franke* (Cal.) 31 Pac. 571; *Tait v. Tait*, 3 Misc. Rep. 218, 23 N. Y. Supp. 597. But see *Moss v. Moss*, 2 Ired. (N. C.) 56.

²² *Harford v. Morris*, 2 Hagg. Consist. 423; *Browning v. Reane*, 2 Phillim. Ecc. 70; *Rex v. Wakefield*, 2 Lewin, Cr. Cas. 279; *Hull v. Hull*, 5 Eng. Law & Eq. 589; *Clark v. Field*, 13 Vt. 460; *Gillett v. Gillett*, 78 Mich. 184, 43 N. W. 1101; *Lyndon v. Lyndon*, 69 Ill. 43; *Robertson v. Cole*, 12 Tex. 356; *Moot v. Moot*, 37 Hun (N. Y.) 288. In *Gillett v. Gillett*, supra, it appeared that complainant, a man of 75, blind, more or less deaf, and otherwise broken, who had just received a liberal pension, with a large amount of arrears, was induced, by

necessary to its validity, and may be avoided.²³ It has been held that the compulsion, to avoid the marriage, must cause fear of bodily harm,²⁴ but this view cannot be sustained. The better opinion is that, if either party is in a state of mental incompetency to resist pressure improperly brought to bear, there is no legal consent.²⁵ In *Scott v. Sebright*²⁶ the duress consisted in threatening one in financial distress with exposure, and the court held that, inasmuch as this resulted in depriving the party of her free will, there was no real consent, and the marriage was annulled. So where a man is illegally or maliciously, and without probable cause, arrested for bastardy or seduction, and marries the complainant to avoid imprisonment, it is held that he acts under such duress as will avoid the marriage; and the same is true in other cases of illegal arrest.²⁷ If, however, an arrest, or threatened arrest, for bastardy or seduction, is valid, a marriage to escape arrest or punishment is not under duress, for there can be no duress in compelling a man to perform a legal duty.²⁸ Threats or force which do not coerce are not duress.²⁹

putting him under the influence of liquors, and probably of drugs, to marry defendant, a woman less than half his age, who had a young child, and with whom he was very slightly acquainted, and for whom he entertained no attachment. It was held that the marriage was properly annulled.

²³ *Scott v. Sebright*, 12 Prob. Div. 21; *Shoro v. Shoro*, 60 Vt. 268, 14 Atl. 177; *Willard v. Willard*, 6 Baxt. (Tenn.) 297; *Bassett v. Bassett*, 9 Bush (Ky.) 696; *Anderson v. Anderson* (Sup.) 26 N. Y. Supp. 492. That a marriage will not be annulled on the ground of duress, unless it is shown that the other party caused the duress, or knowingly used it or availed himself of it to procure the marriage, see *Sherman v. Sherman* (Com. Pl.) 20 N. Y. Supp. 414. But see *Marks v. Crume* (Ky.) 29 S. W. 436.

²⁴ Ayl. Par. 362; *Stevenson v. Stevenson*, 7 Phila. (Pa.) 386.

²⁵ *Scott v. Sebright*, 12 Prob. Div. 21; *Rex v. Wakefield*, 39 Am. Reg. 316; *Harford v. Morris*, 2 Hagg. Consist. 423; *Willard v. Willard*, 6 Baxt. (Tenn.) 297; *Lyndon v. Lyndon*, 69 Ill. 43.

²⁶ 12 Prob. Div. 21.

²⁷ *Reg. v. Orgill*, 9 Car. & P. 80; *Shoro v. Shoro*, 60 Vt. 268, 14 Atl. 177; *Soule v. Bonney*, 37 Me. 128; *Bassett v. Bassett*, 9 Bush (Ky.) 696; *Barton v. Morris*, 15 Ohio, 408.

²⁸ *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Honnett v. Honnett*, 33 Ark. 156; *Marvin v. Marvin*, 52 Ark. 425, 12 S. W. 875; *Sickles v. Carson*, 26 N. J. Eq.

²⁹ See note 29 on following page.

As false and fraudulent representations as to rank, fortune, character, or health are no ground for annulling a marriage that is

440; *Copeland v. Copeland* (Va.) 21 S. E. 241; *Williams v. State*, 44 Ala. 24; *State v. Davis*, 79 N. C. 603; *Johns v. Johns*, 44 Tex. 40; *Medrano v. State*, 32 Tex. Cr. R. 214, 22 S. W. 684; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 South. 836. In *Marvin v. Marvin*, *supra*, it was held that marriage cannot be avoided on the ground of duress where a man is lawfully arrested on process for seduction, and marries the woman to procure his discharge, and that the fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was on probable cause, and not from malice merely. But abuse of lawful process may constitute duress. Thus, where an inexperienced boy of 18 was arrested on the charge of bastardy, and while under arrest was advised by the justice to marry the female making the charge, and, notwithstanding his assertions of innocence, was threatened with a conviction and confinement in the penitentiary, and the boy married the woman to avoid such punishment, the marriage was annulled on the ground of duress. *Smith v. Smith*, 51 Mich. 607, 17 N. W. 76.

²⁰ In a suit in England by a woman to annul a marriage, it appeared that the parties were Americans and cousins. Respondent had made an offer of marriage to the petitioner, which she had refused. On a Sunday, he being then under 21 and she 24 years of age, under the pretense of going to an afternoon service at a church, he took her to another church, and outside the church said to her suddenly, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." She testified that she was so alarmed that she did not know what she was doing, and went into the church, where the ceremony of marriage was performed, and she signed the register. Respondent had previously obtained a license, on a false declaration as to his own age and as to the petitioner's residence, and had made arrangements at the church for the marriage to be performed that day. The vicar who performed the ceremony stated that the petitioner went through it without showing any signs of unwillingness, repeated the responses in an audible tone, and signed the register in a clear, firm hand. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins, and not as husband and wife. Petitioner never told her parents or friends of the marriage, because, as she said, she did not regard it as binding. Respondent, who did not appear in the suit, admitted that he had only married petitioner for her money, and that he did not care for her. There was evidence that the petitioner was of a weak, impressionable character, with not much power of resistance to a stronger will, but that she was not particularly disposed to fall into a "hysterical state," in the medical sense of the term. It was held that the facts were insufficient to rebut the presumption of consent, that the marriage was valid, and that the suit must be dismissed. *Cooper v. Crane* [1891] Prob. Div. 369.

otherwise valid,³⁰ it is clear that a mistake as to these particulars is not sufficient to invalidate it. These are not essentials of the marriage. If, however, a mistake is of such a nature as to prevent the party from understanding the nature of the marriage, it must necessarily avoid it; for there can, in such a case, be no mutual consent. If a person should intend to marry one person, for instance, and by mistake should marry another, there would be no consent, and therefore no valid marriage.³¹

Marriages induced by fraud or duress, or entered into under error, are sometimes said to be void, and not merely voidable; but this is not true. They are not absolutely void, but voidable at the option of the party deceived, coerced, or mistaken. If that party chooses to avoid the marriage, he or she may do so, and thereby render it void ab initio; and no suit for nullity is necessary. The other party clearly cannot avoid the marriage, for he would not be permitted to set up his own fraud or wrong to defeat it, and he could not set up an error on the part of the other party, of which the latter did not complain.³² If the party coerced or deceived—and it would seem true, also, in the case of error—recognizes the marriage as valid, and cohabits with the other party, after discovery of the fraud, or when no longer under the duress, the marriage cannot afterwards be avoided.³³ Fraud, duress, or error cannot be set up by third persons to defeat the marriage.³⁴ These considerations are sufficient to show that the marriage is not void, but voidable only.

³⁰ Ante, p. 9. As to error, see 2 Kent, Comm. 77; *Benton v. Benton*, 1 Day (Conn.) 111; *Fielding's Case*, *Burke, Cel. Trials*, 63, 78.

³¹ *Reg. v. Millis*, 10 Clark & F. 534, 785; *Rex v. Inhabitants of Burton-upon-Trent*, 3 Maule & S. 537; *Stayte v. Farquharson*, 3 Addams, Ecc. 282.

³² *Farley v. Farley*, 94 Ala. 501, 10 South. 646.

³³ *Schwartz v. Schwartz*, 29 Ill. App. 516; *Leavitt v. Leavitt*, 13 Mich. 452; *Hampstead v. Plaistow*, 49 N. H. 84; *Scott v. Shufeldt*, 5 Paige (N. Y.) 43. In *Schwartz v. Schwartz*, supra, a man sought to avoid a suit by a woman for separate maintenance by showing that his marriage was procured by duress of imprisonment for seduction under promise of marriage. It was held that his claim could not be sustained, even though the arrest was unlawful, where the evidence showed that after the marriage he approved and ratified it, and never denied its validity until the suit for separate maintenance was brought.

³⁴ *McKinney v. Clarke*, 2 Swan (Tenn.) 321; *Farley v. Farley*, 94 Ala. 501, 10 South. 646. "If a marriage may be annulled for fraud, it must be such a

No decree of nullity, however, is necessary, unless required by statute. The marriage, as already stated, is sufficiently avoided if it is repudiated on discovery of the fraud or error, or when released from the duress.

MENTAL CAPACITY OF THE PARTIES.

11. To constitute a valid marriage, the parties must be capable of intelligently consenting. They may be incapable of intelligent consent by reason of
- (a) Insanity or intoxication.
 - (b) Nonage.

SAME—INSANITY AND INTOXICATION.

12. A marriage is void, in the absence of a statute, if either party, by reason of defect or disease of the mind, was incapable of intelligently consenting. The parties must have been mentally capable of understanding the nature and consequences of marriage. The same rule applies where a party is drunk at the time of the marriage. In most states, by statute, such marriages are declared voidable, and not void; and in some states they are held voidable only, independently of any statute.

Where by reason of defect of the mind, as in case of idiocy, or disease of the mind, as in case of lunacy, a person has not sufficient mental capacity to give an intelligent consent, he or she cannot enter into a valid marriage, for there can be no real consent.³⁵

fraud as operates upon one or other of the immediate parties to the contract, and has the legal effect of vitiating the contract between the parties ab initio. But, as respects strangers, fraud cannot be predicated of a contract which the immediate parties thereto may lawfully enter into, which no principle of municipal law forbids, or can restrain the consummation of." *McKinney v. Clarke*, supra.

³⁵ *Foster v. Means*, 1 Speer, Eq. (S. C.) 569; *True v. Ranney*, 21 N. H. 52; *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. 364; and cases hereafter cited.

What degree of mental defect or disease is sufficient to invalidate a marriage is a question as to which the authorities are somewhat at variance. The rule generally laid down is that the party must be able to understand the nature of marriage, and its consequences.³⁶ This makes the test whether there is sufficient mental capacity to give an intelligent consent. "If the incapacity be such that the party be incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person or property, such person cannot dispose of his or her own person and property by the matrimonial contract, any more than by any other contract."³⁷ Mere mental weakness, if it does not deprive the party of capacity to understand and appreciate the consequences of the step he is taking, does not affect the validity of a marriage.³⁸ Nor is its validity affected by insanity or insane delusions or impulses on other subjects.³⁹ As was said in a case in which it was sought to annul a marriage on the ground that the woman was a kleptomaniac: "It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity, or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses."⁴⁰

³⁶ *Browning v. Reane*, 2 Phillim. Ecc. 70; *True v. Ranney*, 21 N. H. 52; *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. 363; *Anon.*, 4 Pick. (Mass.) 32; *Inhabitants of Atkinson v. Inhabitants of Medford*, 46 Me. 510; *Ward v. Dulaney*, 23 Miss. 410; *Cole v. Cole*, 5 Sneed (Tenn.) 57; *McElroy's Case*, 6 Watts & S. (Pa.) 451; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323.

³⁷ *Browning v. Reane*, *supra*.

³⁸ 2 Kent, Comm. 76; *Browning v. Reane*, *supra*; *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. 355; *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. 837.

³⁹ 2 Kent, Comm. 76; *Portsmouth v. Portsmouth*, *supra*.

⁴⁰ *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323.

The insanity must exist at the time of the marriage, to avoid it, neither prior nor subsequent insanity being sufficient.⁴¹ Nor are both prior and subsequent insanity sufficient, if the marriage took place in a lucid interval.⁴² As said by the Illinois court: "It would be a harsh rule indeed that would permit a man who has married a woman who later in life becomes insane to put her away on account of her inexpressibly sad misfortune. It is to the credit of our common humanity that there cannot be found, in all the range of judicial proceedings, a single case that holds that insanity is or could be a cause for divorce."⁴³

Intoxication of a person at the time of his or her marriage avoids it for the same reason that insanity avoids it,—because there is no real consent. The intoxication, however, must be so excessive as to prevent the party from giving an intelligent consent. If he understands the nature and consequences of his act, the fact that he is under the influence of liquor will not avail to avoid the marriage.⁴⁴

Some of the authorities hold that insanity renders a marriage voidable, and not void; that a person on regaining his reason, even temporarily, may affirm a marriage celebrated while he was insane, and thereby render it absolutely binding.⁴⁵ And there are authorities to the effect that, if the other party knew he was marrying an

⁴¹ *Turner v. Meyers*, 1 Hagg. Consist. 414; *Parnell v. Parnell*, 2 Hagg. Consist. 169; *Banker v. Banker*, 63 N. Y. 409; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634, 28 Atl. 439; *Smith v. Smith*, 47 Miss. 211; *Hamaker v. Hamaker*, 18 Ill. 137; *Lloyd v. Lloyd*, 66 Ill. 87; *Wertz v. Wertz*, 43 Iowa 534; *Baker v. Baker*, 82 Ind. 146.

⁴² *Turner v. Meyers*, 1 Hagg. Consist. 414; *Parker v. Parker*, 6 Eng. Ecc. R. 165; *Smith v. Smith*, 47 Miss. 211; *Banker v. Banker*, 63 N. Y. 409; *Nonnemacher v. Nonnemacher*, *supra*.

⁴³ *Lloyd v. Lloyd*, *supra*. In a very few states it has been made a ground for divorce.

⁴⁴ 2 Kent, Comm. 451; *Clement v. Mattison*, 3 Rich. Law (S. C.) 93; *Gore v. Gibson*, 13 Mees. & W. 623; *Dixon v. Dixon*, 22 N. J. Eq. 91; *Jenners v. Howard*, 6 Blackf. (Ind.) 240; *Prine v. Prine*, 36 Fla. 676, 18 South. 781.

⁴⁵ *Dwight, Pers. & Pers. Prop.* 143; *Cole v. Cole*, 5 Sneed (Tenn.) 57; *Wiser v. Lockwood's Estate*, 42 Vt. 720; *State v. Setzer*, 97 N. C. 252, 1 S. E. 558. Some hold the marriage void until it is ratified, *Cole v. Cole*, *supra*; while others hold it valid until it is avoided, *Wiser v. Lockwood's Estate*, *supra*.

insane person, he cannot avoid the marriage.⁴⁶ This is the proper view, but it must be conceded that by the weight of authority, in the absence of a statute providing otherwise, a marriage by a lunatic or idiot or drunken person is not merely voidable, but absolutely void, and therefore incapable of ratification, or of having any effect whatever.⁴⁷ Perhaps in most states this rule has been changed by statute, and such marriages are made voidable only, and not void.⁴⁸

SAME—NONAGE.

13. The parties must be of an age at which the law deems them capable of intelligently consenting to enter into the marriage relation. At common law the age of consent is 14 for males, and 12 for females, but in most states the age of consent has been raised by statute. The effect of marriages by infants is as follows:

- (a) **Marriages after the age of consent are binding.**
- (b) **Marriages between the age of consent and the age of seven years are voidable on or before reaching the age of consent, and by either party.**
- (c) **Marriages below the age of seven are absolutely void.**

The age of consent—that is, the age at which an infant could consent to marriage so that it would be binding,—was fixed at common law at 14 for males and 12 for females; but the common law has been changed in this respect in many states by statute. In

⁴⁶ *Hancock v. Peaty*, L. R. 1 Prob. & Div. 335, 341.

⁴⁷ *Schouler*, Dom. Rel. § 18; *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. 363; *Foster v. Means*, 1 Speer, Eq. (S. C.) 569; *Inhabitants of Unity v. Inhabitants of Belgrade*, 76 Me. 419; *Crump v. Morgan*, 3 Ired. Eq. (N. C.) 91; *Rawdon v. Rawdon*, 28 Ala. 565; *Jenkins v. Jenkins' Heirs*, 2 Dana (Ky.) 102; *Keyes v. Keyes*, 22 N. H. 553; *Ward v. Dulaney*, 23 Miss. 410.

⁴⁸ *Stim. Am. St. Law*, § 6113; *Inhabitants of Goshen v. Inhabitants of Richmond*, 4 Allen (Mass.) 458; *Wiser v. Lockwood's Estate*, 42 Vt. 720; *Hamaker v. Hamaker*, 18 Ill. 137.

some states the age of consent has been raised as high as 21 for males and 18 for females. Marriages entered into by infants who are above the age of consent are binding on them, and cannot be avoided on their becoming of age.⁴⁹ Marriages entered into between the age of 7 and below the age of consent may be avoided on reaching the age of consent, or before.⁵⁰ Marriages entered into where either party is below 7 are absolutely void.⁵¹ The fact that marriages entered into above the age of consent cannot, like the contracts of infants, be avoided on their attaining their majority, rests on the peculiar nature of marriage,—on the fact that it is not a contract, but a status, involving important and far-reaching property rights, and interests of children and third persons, which public policy cannot allow to be jeopardized at the will of either party.⁵² But an infant's promise to marry, though he be over the age of consent, may be avoided by him like any other contract, for none of the complications arising from the assumption of the status of marriage are thereby affected.⁵³ The marriage of infants between the age of seven and the age of consent is not absolutely void, but is only inchoate and imperfect, and if on coming to the age of consent, but not before reaching that age,⁵⁴ they agree to continue together, they need not

⁴⁹ 2 Kent, Comm. 78; Co. Litt. 79b; 1 Bl. Comm. 436; Reeve, Dom. Rel. 236; Parton v. Hervey, 1 Gray (Mass.) 119; Pool v. Pratt, 1 Chip. (Vt.) 251; Governor v. Rector, 10 Humph. (Tenn.) 61.

⁵⁰ 2 Kent, Comm. 78; Co. Litt. 33a, 79b; 2 Com. Dig. "Baron and Feme," 5; 1 Bl. Comm. 436; Beggs v. State, 55 Ala. 108; McDeed v. McDeed, 67 Ill. 545; Koonce v. Wallace, 7 Jones (N. C.) 194; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806; notes 55, 56, *infra*. In Aymar v. Roff, 3 Johns. Ch. (N. Y.) 49, where a man had married a girl under 12 years of age, and the girl declared her ignorance of the nature and consequences of the marriage, and her dissent to it, a court of equity, on a bill by her next friend, ordered her to be placed under its protection as a ward of the court, and forbade the man to have any intercourse or correspondence with her, under pain of contempt.

⁵¹ 2 Burn, Ecc. Law, 434a.

⁵² Schouler, Dom. Rel. § 20; 1 Bish. Mar., Div. & Sep. § 566; Parton v. Hervey, 1 Gray (Mass.) 119.

⁵³ Holt v. Ward Clarendieux, 2 Strange, 937; Hunt v. Peake, 5 Cow. (N. Y.) 475; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76; Clark, Cont. 231, note, and cases cited.

⁵⁴ Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806.

be married again,⁵⁵ and their continuing to live together after reaching the age of consent is a sufficient affirmance.⁵⁶

Some of the courts seem to hold that a marriage by an infant under the age of consent is void until affirmed, and not valid until disaffirmed, while others take the latter view. "Marriages in this state," it was said by the Ohio court, "contracted by male persons under the age of eighteen, and female persons under fourteen, are invalid, unless confirmed by cohabitation after arriving at those ages, respectively. Such a marriage not thus confirmed does not subject a party to punishment for bigamy for contracting a subsequent marriage while the first husband or wife is living."⁵⁷ On the other hand, however, it was held in Arkansas that, under an indictment for bigamy, evidence that the first marriage was within the age of legal consent is no defense, unless it also be shown that it was annulled by a court of competent jurisdiction. "By the common law," it was said, "if he did not disaffirm the marriage on reaching the age of legal consent, but cohabited with the wife after arriving at such age, it would be an affirmance of the marriage."⁵⁸ "The statute serves the purpose of its enactment when construed as operating merely an enlargement of the age of consent from that fixed by the common law—of twelve in females and fourteen in males—to fourteen in females and seventeen in males. The marriage of persons not of the statutory age is, as was the marriages between persons not of the age of consent at common law, imperfect, becoming perfect only by affirmance when the requisite age is obtained, until this affirmance, it is a marriage in fact, and the second marriage of either party is bigamy."⁵⁹ In the case from which this quotation is taken, the Ohio case was disapproved as being "opposed to the great weight of authority."

The right to disaffirm a marriage on the ground of nonage is not

⁵⁵ 1 Bl. Comm. 436; *Elliott v. Gurr*, 2 Phillim. Ecc. 16; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Koonce v. Wallace*, 7 Jones (N. C.) 194; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *State v. Cone*, 86 Wis. 498, 57 N. W. 50.

⁵⁶ 2 Dane, Abr. 301; *Coleman's Case*, 6 City H. Rec. (N. Y.) 3.

⁵⁷ *Shafher v. State*, 20 Ohio, 1.

⁵⁸ *Walls v. State*, 32 Ark. 565.

⁵⁹ *Beggs v. State*, 55 Ala. 108. And see *State v. Cone*, 86 Wis. 498, 57 N. W. 50.

limited to the party who was under the age of consent, where the other party was of a suitable age, but extends also to the latter. In this respect, marriage differs from contract.⁶⁰ A person under the age of consent is not estopped from avoiding his marriage on reaching the age of consent by the fact that he fraudulently misrepresented his age.⁶¹

A marriage that is voidable because of nonage differs from a marriage that is voidable because of a canonical disability, in that it can be avoided by the act of the party or parties, and no decree of nullity is necessary.⁶² As will be seen in another section, statutes raising the age of consent, though they may declare a marriage under the age of consent to be "void," are construed to mean "voidable," and to leave the effect of the marriage the same as at

⁶⁰ Schouler, Dom. Rel. § 20; 1 Bish. Mar. & Div. § 149; Co. Litt. 79; Shaffer v. State, 20 Ohio, 1. But see *People v. Slack*, 15 Mich. 193. "The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting. A fortiori, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen or a girl under twelve years of age marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree, and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for, if they are habiles ad matrimonium, it is a good marriage, whatever their age may be. And in our law it is so far a marriage that if, at the age of consent, they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may, for in contracts the obligation must be mutual; both must be bound, or neither; and so it is, vice versa, when the wife is of years of discretion, and the husband under." 1 Bl. Comm. 436. It will be noticed that, in thus stating the law, Blackstone not only erroneously classes marriage as a contract, but by doing so he falls into error in attempting to support the rule allowing marriage to be avoided by either party, though one of them was above the age of consent, by reference to principles of the law of contract; that is, he erroneously assumes that, where an adult makes a contract with an infant, he, as well as the infant, may avoid it. This tends to show the difficulty and danger in considering marriage as a contract.

⁶¹ See *Eliot v. Eliot*, 81 Wis. 295, 51 N. W. 81.

⁶² Co. Litt. 79; 2 Burn, Ecc. Law, 500; 1 Bl. Comm. 436; *Walls v. State*, 32 Ark. 565, 570; *McDeed v. McDeed*, 67 Ill. 545; *People v. Slack*, 15 Mich. 193.

common law.⁶³ Consent of parents, as an essential of marriage, is referred to in another place.⁶⁴

CAPACITY OF PARTIES OTHERWISE THAN MENTALLY.

14. The parties must be capable, in other respects than mentally, of entering into the marriage relation. There must be no impediment of

- (a) Relationship.
- (b) Physical incapacity.
- (c) Civil conditions.
- (d) Prior marriage.

SAME—RELATIONSHIP.

15. The parties must not be within the prohibited degrees of kindred, either by consanguinity or affinity. In the absence of a statute, there can be no valid marriage within the Levitical degrees; that is, within the third degree of civil reckoning, inclusive, or, in other words, nearer than first cousins. In the absence of statutory provision to the contrary, such marriages are voidable, and not void. The whole subject is now very generally regulated by statutes, defining the limits within which relations may not marry, and generally declaring marriages within the prohibited degrees absolutely void.

In England, prior to the reign of Henry VIII., the limits of the disqualification of relationship had been extended so far by the ecclesiastical courts that it became necessary to pass a statute defining the limits within which relations should not be permitted to intermarry; and the statute of 32 Hen. VIII. c. 38, was enacted. This statute prohibited the ecclesiastical courts from impeaching "any marriage without the Levitical degrees." Under this statute the impediment of consanguinity has been treated "as applicable

⁶³ Post, p. 44.

⁶⁴ Post, pp. 30, 31.

to the whole ascending and descending line, and, further, as extending to the third degree of the civil reckoning, inclusive; or, in other words, so as to prohibit all marriages nearer than first cousins.”⁶⁵ Under this statute the impediment of consanguinity, or blood relationship, would extend to a man’s grandmother, his father’s or mother’s sister, his mother, or his daughter or granddaughter. And it would extend to a woman’s grandfather, her father’s or mother’s brother, her father, her son, or her grandson.⁶⁶ The statute is old enough to have become a part of our common law, and it has been so recognized. In most states, however, statutes have been enacted. In some states the limits have been extended.⁶⁷ The rule of consanguinity applies as well to the half blood as to the whole blood,⁶⁸ and to illegitimate as well as legitimate issue.⁶⁹

Affinity is the relationship by marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. “A husband is related by affinity to all the consanguinei of his wife, and, vice versa, the wife to the husband’s consanguinei; for, the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity.”⁷⁰ In English law the same impediment to marriage existed in the case of relationship by affinity as in the case of relationship by blood, so that a man could not marry his grandfather’s wife, his wife’s grandmother, his father’s brother’s wife, his mother’s brother’s wife, his wife’s father’s sister, his wife’s mother’s sister, his stepmother, his wife’s mother, his wife’s sister, or his stepdaughter. And a woman could not marry her grandmother’s husband, her husband’s grandfather, her father’s sister’s husband, her mother’s sister’s husband, her husband’s father’s

⁶⁵ Schouler, *Dom. Rel.* (5th Ed.) § 16.

⁶⁶ Schouler, *Dom. Rel.* (5th Ed.) § 16; *Harrison v. State*, 22 Md. 468; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 531.

⁶⁷ See *Stim. Am. St. Law*, § 6111. In some states the prohibition includes first cousins. *Id.*

⁶⁸ *Reg. v. Inhabitants of Brighton*, 1 Best & S. 447. In most states there are special enactments to this effect.

⁶⁹ *Reg. v. Chadwick*, 11 Q. B. 173; *Horner v. Liddiard*, 1 Hagg. Consist. 337, 352; *Morgan v. State*, 11 Ala. 289. *Contra*, *State v. Roswell*, 6 Conn. 446.

⁷⁰ *Gib. Cod.* 412; 1 *Bl. Comm.* 435; *Butler v. Gastrill*, *Gilb. Ch.* 156.

brother, her husband's mother's brother, her stepfather, her husband's father, her husband's brother, or her stepson.⁷¹ In this country many of the courts have refused to follow the English law in this respect. In Vermont, for instance, it was held that a man could marry his deceased wife's sister.⁷² In most states the impediment of relationship both by consanguinity and affinity is entirely regulated by statute.

Consanguinity and affinity, being canonical disabilities, render marriages voidable, and not void,⁷³ unless the rule has been changed by statute, and all the principles governing voidable marriages apply. In most states, by statute, marriage within the prohibited degrees of kindred are now declared to be not merely voidable, but void.⁷⁴ But statutes declaring such marriages to be void have been held in some courts to be simply declaratory of the English law, that is, to mean that they are void only upon a decree of court during the lives of the parties.⁷⁵

SAME—PHYSICAL INCAPACITY.

16. The parties must be physically capable; but capacity to copulate, not fruitfulness, is the test. The incapacity must exist at the time of the marriage. Neither party can set up his or her own impotence to defeat the marriage. In the absence of statutory provision to the contrary, impotence renders a marriage voidable, and not void.

The parties to a marriage must be physically capable. Ability to propagate the species is not, however, as might well be supposed, the test of the requisite physical condition. If the parties are able

⁷¹ Schouler, Dom. Rel. § 16; *Hill v. Good*, Vaughan, 302; *Harris v. Hicks*, 2 Salk. 548.

⁷² *Blodget v. Brinsmaid*, 9 Vt. 27.

⁷³ Schouler, Dom. Rel. § 16; *Harrison v. State*, 22 Md. 468; *Boylan v. Deinzer*, 45 N. J. Eq. 485, 18 Atl. 119.

⁷⁴ Stim. Am. St. Law, § 6112.

⁷⁵ *Harrison v. State*, 22 Md. 468; *Bonham v. Badgley*, 7 Ill. 622; *Parker's Appeal*, 44 Pa. St. 309; *Com. v. Perryman*, 2 Leigh (Va.) 717; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551; post, p. 44.

to have sexual intercourse, the requirements of the law are satisfied. Copula, not fruitfulness, is the test.⁷⁶ There must be an impotentia copulandi on the part of the man or of the woman, proceeding from malformation, frigidity, disease, or some other like cause. The law does not fail to recognize the procreation of children as one of the ends of matrimony, but it does refuse to annul a marriage merely because one of the parties is not capable of procreation.⁷⁷ Impotence must exist at the time of the marriage, to avoid it. If a party is physically capable of copulation at the time of the marriage, his or her subsequent impotency does not avoid the marriage.⁷⁸ Neither party will be permitted to set up his or her own impotence as a ground of nullity.⁷⁹ Nullity of marriage has been decreed on the ground of impotence, even when it was curable, where the party refused to submit to the necessary treatment to effect a cure.⁸⁰ Except in such a case, however, curable impotence does not render a marriage invalid.

In the absence of a statutory provision to the contrary, impotence, being a canonical impediment, renders a marriage voidable, and not absolutely void,⁸¹ and the principles applicable to voidable marriages apply.⁸² In some states this rule has been changed by statute.⁸³ But the same rule of construction applies to these statutes as has been mentioned as applicable to statutes in regard to relationship. As to whether a court of equity has jurisdiction, in

⁷⁶ D— v. A—, 1 Rob. Ecc. 279, 298; Anon., Deane & S. 296; Briggs v. Morgan, 3 Phillim. Ecc. 325; Devanbakh v. Devanbakh, 5 Paige (N. Y.) 554; E— v. T—, 33 Law J. Mat. Cas. 37; G— v. G—, 33 Md. 401; Keith v. Keith, Wright (Ohio) 518; Powell v. Powell, 18 Kan. 371; Bascomb v. Bascomb, 25 N. H. 267; Norton v. Norton, 2 Aiken (Vt.) 188.

⁷⁷ D— v. A—, supra.

⁷⁸ W— v. H—, 30 Law J. Prob. Mat. & Adm. 73; D— v. A—, supra.

⁷⁹ Norton v. Seton, 3 Phillim. Ecc. 147.

⁸⁰ Devanbakh v. Devanbakh, 6 Paige (N. Y.) 175; L— v. L—, 7 Prob. Div. 16.

⁸¹ Schouler, Dom. Rel. § 19; T. v. M. L. R., 1 Prob. & Div. 31; A. v. B., L. R. 1 Prob. & Div. 559; T. v. D., L. R. 1 Prob. & Div. 127; Cavell v. Prince, L. R. 1 Exch. 246; Anon., 24 N. J. Eq. 19; P. v. S., 37 Law J. Mat. Cas. 80; Smith v. Morehead, 6 Jones, Eq. (N. C.) 360.

⁸² Post, p. 35.

⁸³ Stim. Am. St. Law, § 6112.

this country, to annul a marriage on the ground of impotence is shown in another place.⁸⁴

SAME—CIVIL CONDITIONS—RACE, ETC.

17. The parties must not be disqualified by civil conditions. Thus, in many states, marriages between negroes, Indians, or Chinese, and white persons, are prohibited.

At common law, and in England to-day, no impediment to marriage exists on account of race, color, religion, or social rank.⁸⁵ In many of the United States, by statute, however, marriages between white persons and negroes, and in a few states between white persons and Indians or Chinese, are unlawful.⁸⁶ These statutes, as a rule, make such unions absolutely void, without the necessity of a judicial sentence, and leave either party free to enter into a subsequent marriage.

Slavery was formerly a further impediment. It was a rule that a slave, being a chattel, could not make any contract; and, as marriage was in the nature of a contract, slave marriages were therefore absolutely void.⁸⁷ But they have now very generally been legalized by statute, where cohabitation continued after emancipation.

SAME—PRIOR MARRIAGE.

18. In the absence of statutory provision to the contrary, a valid and undissolved prior marriage of either party renders a marriage absolutely void ab initio, even though the parties may have acted in good faith, and in a reasonable belief that the former spouse was dead or divorced.

⁸⁴ Post, p. 39.

⁸⁵ 1 Bish. Mar., Div. & Sep. § 691.

⁸⁶ Stim. Am. St. Law, § 6112 F. See *State v. Brady*, 9 Humph. (Tenn.) 74; *State v. Hooper*, 5 Ired. (N. C.) 201; *Succession of Minvielle*, 15 La. Ann. 342; *Bailey v. Fiske*, 34 Me. 77; *Jones v. Jones*, 45 Md. 144.

⁸⁷ *Hall v. U. S.*, 92 U. S. 27; *Cantelou v. Doe*, 56 Ala. 519; *Howard v. Howard*, 6 Jones (N. C.) 235.

A valid and undissolved prior marriage by either or both of the parties is an impediment to marriage. An attempted second marriage while a valid prior marriage is undissolved is absolutely void, and void ab initio, without any decree of court; the children of the second marriage being illegitimate, and the marriage being subject to collateral attack by any person, and at any time.⁸⁸ This is the common-law rule, but it has been changed in some states by statutes providing, in substance, that if the second marriage was entered into in good faith, and on a reasonable belief in the former spouse's death, the issue shall be deemed the legitimate children of the parent not previously married.⁸⁹ In the absence of a statutory provision, however, the good faith of either or both of the parties is immaterial, in so far as the validity of the marriage and legitimacy of the children are concerned,⁹⁰ though in some jurisdictions a bona fide belief in the death of a husband or wife, under certain circumstances, may be a defense in a prosecution for bigamy.⁹¹

A void marriage, of course, is no marriage at all, and can impose no restraint on the right of the parties to marry again. Therefore, where an attempted marriage is void, a second marriage is perfectly

⁸⁸ *Riddlesden v. Wogan*, Cro. Eliz. 858; *Pride v. Earls of Bath*, 1 Salk. 121; *Plant v. Taylor*, 7 Hurl. & N. 211; *Miles v. Chilton*, 1 Rob. Ecc. 687; *In re Wilson's Trusts*, L. R. 1 Eq. 247; *Glass v. Glass*, 114 Mass. 563; *Martin's Heirs v. Martin*, 22 Ala. 86; *Fenton v. Reed*, 4 Johns. (N. Y.) 52; *Heffner v. Heffner*, 23 Pa. St. 104; *Jackson v. Claw*, 18 Johns. (N. Y.) 347; *Blossom v. Barrett*, 37 N. Y. 434; *Higgins v. Breen*, 9 Mo. 497; *Ponder v. Graham*, 4 Fla. 23; *Tefft v. Tefft*, 35 Ind. 44; *Rhea v. Rhenner*, 1 Pet. 105; *Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622; *Dare v. Dare*, 52 N. J. Eq. 195, 27 Atl. 654; *Reeves v. Reeves*, 54 Ill. 332; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Emerson v. Shaw*, 56 N. H. 418; *Janes v. Janes*, 5 Blackf. (Ind.) 141; *Williams v. State*, 44 Ala. 24; note 90, *infra*. It is immaterial whether the former marriage was formal or informal. A marriage by mutual consent, and cohabitation as husband and wife, without any formal celebration, will render a subsequent formal marriage to another void. *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293.

⁸⁹ *Stim*, Am. St. Law, § 6116.

⁹⁰ *In re Wilson's Trusts*, L. R. 1 Eq. 247; *Glass v. Glass*, 114 Mass. 563; *People v. Dawell*, 25 Mich. 247; *Kenley v. Kenley*, 2 Yeates (Pa.) 207; *Heffner v. Heffner*, 23 Pa. St. 104; *Thomas v. Thomas*, 124 Pa. St. 646, 17 Atl. 182; *Webster v. Webster*, 58 N. H. 3; *Pain v. Pain*, 37 Mo. App. 110.

⁹¹ *Clark*, Cr. Law, 309.

valid, though the first marriage has not been judicially annulled.⁹² But, for obvious reasons, it is desirable to have the validity of the prior marriage determined by sentence of nullity. A divorce a mensa et thoro, of course, does not entitle either party to marry again; but it is otherwise, in the absence of statutory prohibition, in the case of a divorce a vinculo matrimonii. In many states, however, statutes have been enacted placing restrictions on the right to marry in the latter case, also, as by prohibiting a marriage within a certain time, or prohibiting, in case of divorce for adultery, the guilty party from marrying his or her paramour, or from marrying at all in the lifetime of the other.⁹³ It has been held that a marriage in violation of such prohibitions is not to be regarded as void, so as to bastardize issue, unless expressly so declared by statute.⁹⁴ The divorce must be absolute. A decree nisi is not sufficient to entitle either party to marry.⁹⁵ And of course the divorce must be valid.⁹⁶ A marriage between persons, one of whom has a husband or wife under a prior valid and undissolved marriage still living, is absolutely void, and can have no effect whatever as a marriage.⁹⁷

⁹² *Patterson v. Gaines*, 6 How. 550; *Bruce v. Burke*, 2 Addams, Ecc. 471, 2 Eng. Ecc. R. 381; *Reg. v. Chadwick*, 12 Jur. 174, 11 Q. B. 173; *Appleton v. Warner*, 51 Barb. (N. Y.) 270; *In re Bethune*, 4 Dem. Sur. 392; *McCaffrey v. Benson*, 38 La. Ann. 198; *Reeves v. Reeves*, 54 Ill. 332; *Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622; *Dare v. Dare*, 52 N. J. Eq. 195, 27 Atl. 654; *In re Eichhoff's Estate*, 101 Cal. 600, 36 Pac. 11.

⁹³ See *Succession of Hernandez*, 46 La. Ann. 962, 15 South. 461; *Cox v. Combs*, 8 B. Mon. (Ky.) 231; *Park v. Barron*, 20 Ga. 702; *Clark v. Cassidy*, 62 Ga. 407. See, as to conflict of laws (going out of the state to evade the law), post, p. 46. A statutory prohibition to the effect that, in case of divorce on the ground of adultery, the guilty party can never marry his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded. *Succession of Hernandez*, 46 La. Ann. 962, 15 South. 461.

⁹⁴ *Park v. Barron*, 20 Ga. 702; *Crawford v. State* (Miss.) 18 South. 848. *Contra*, *Ovitt v. Smith* (Vt.) 33 Atl. 769.

⁹⁵ *Cook v. Cook*, 144 Mass. 163, 10 N. E. 749.

⁹⁶ *McCreery v. Davis* (S. C.) 22 S. E. 178.

⁹⁷ See the cases cited in notes 88-92, supra. It was held, however, in Massachusetts, that if one party was ignorant that the other had a spouse living,

The presumptions as to dissolution of the prior marriage by death or divorce are considered in a subsequent section.⁹⁸

FORMALITIES IN CELEBRATION—INFORMAL MARRIAGES.

19. The parties should comply with the statutory law in the celebration of marriage, but noncompliance does not necessarily render the marriage invalid. At common law no formalities are necessary; mutual consent, express or implied from conduct, being sufficient.
20. Informal marriages may be consummated in two ways, namely:
 - (a) *Per verba de præsenti*,—that is, by consent to live together presently as husband and wife,—no copula being necessary.
 - (b) *Per verba de futuro cum copula*; that is, by an agreement to marry in the future, followed by copula in pursuance thereof. In such case, present agreement at the time of the copula is implied.
21. If a statute prescribes formalities for the celebration of marriage, it is not to be construed as rendering an informal marriage invalid, unless it expressly so declares.

Whether a marriage is valid at common law, without formal celebration, is a question upon which the courts have been divided. Perhaps in England, and certainly by the great weight of authority in this country, no formality in the celebration of a marriage is necessary, unless required by statute; but a marriage is perfectly valid at common law, whatever the form of celebration, and even if all ceremony was dispensed with. All that is necessary is that the parties shall consent to presently live together as husband and

and has died, the other cannot annul the marriage. *Rawson v. Rawson*, 150 Mass. 578, 31 N. E. 653.

⁹⁸ Post, p. 41.

wife.⁹⁹ A few of the courts have refused to recognize informal marriages,¹⁰⁰ but in most of the states they are recognized unless a statute has expressly made a formal celebration necessary.

In most if not all of the states, statutes have been enacted prescribing certain formalities to be observed in the celebration of marriages,—as, for instance, statutes prescribing the persons who shall be competent to perform the marriage ceremony, or requiring a license, publication of banns, consent of parents, registration, etc. By the great weight of opinion in this country, however, these statutes should be construed as directory merely, and not mandatory, unless they are expressly made mandatory by their terms; and marriages which are in other respects valid at common law are held to be valid in spite of any informality in their celebration, unless the statute expressly declares that failure to observe the prescribed formality shall render the marriage void. The mere fact that a

⁹⁹ *Reg. v. Millis*, 10 Clark & F. 534; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Dickerson v. Brown*, 49 Miss. 357; *Jewell v. Jewell*, 1 How. 219; *Meister v. Moore*, 96 U. S. 76; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281; *Teter v. Teter*, 101 Ind. 129; *Campbell's Adm'r v. Gullatt*, 43 Ala. 57; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325; *Graham v. Bennet*, 2 Cal. 503; *White v. White*, 82 Cal. 427, 23 Pac. 276; *Bowman v. Bowman*, 24 Ill. App. 165; *Com. v. Stump*, 53 Pa. St. 132; *Askew v. Dupree*, 30 Ga. 173; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Hutchins v. Kimmell*, 31 Mich. 126; *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293; *Carmichael v. State*, 12 Ohio St. 553; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. 1041; *Fenton v. Reed*, 4 Johns. (N. Y.) 52; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Cheney v. Arnold*, 15 N. Y. 345; *Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick*, 2 Vt. 151; *Hynes v. McDermott*, 91 N. Y. 451; *Wilcox v. Wilcox*, 46 Hun. 32; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Hargroves v. Thompson*, 31 Miss. 211; *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209; *Dyer v. Brannock*, 66 Mo. 391; *State v. Worthingham*, 23 Minn. 528; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *Guardians of the Poor v. Nathans*, 2 Brewst. (Pa.) 149; *Town of Londonderry v. Town of Chester*, 2 N. H. 268; *Blanchard v. Lambert*, 43 Iowa, 228.

¹⁰⁰ *Denison v. Denison*, 35 Md. 361; *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36; *Inhabitants of Town of Milford v. Inhabitants of Town of Worcester*, 7 Mass. 48; *Com. v. Munson*, 127 Mass. 459; *Norcross v. Norcross*, 155 Mass. 425, 29 N. E. 506; *State v. Hodgskins*, 19 Me. 155; *Grisham v. State*, 2 Yerg. (Tenn.) 589; *State v. Samuel*, 2 Dev. & B. (N. C.) 177; *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811; *In re Smith's Estate*, 4 Wash. St. 702, 30 Pac. 1059; *Morrill v. Palmer* (Vt.) 33 Atl. 829.

statute prescribes certain formalities does not render invalid a marriage in which those formalities are not observed.¹⁰¹

In states where no formalities of celebration are necessary, words expressing mutual consent to live together presently as husband and wife, with nothing more, constitute a valid marriage. This is known as "marriage per verba de præsenti."¹⁰² Likewise, an

¹⁰¹ See the cases cited above; and see, particularly, *Meister v. Moore*, 96 U. S. 76; *Blackburn v. Crawford*, 3 Wall. 185; *Hutchins v. Kimmell*, 31 Mich. 126; *State v. Worthingham*, 23 Minn. 528; *Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick*, 2 Vt. 151; *Bowman v. Bowman*, 24 Ill. App. 165; *Port v. Port*, 70 Ill. 484; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Hervey v. Moseley*, 7 Gray (Mass.) 479; *Teter v. Teter*, 101 Ind. 129; *Town of Londonderry v. Town of Chester*, 2 N. H. 268; *Dyer v. Brannock*, 66 Mo. 391; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Holmes v. Holmes*, 6 La. 463. That consent of parents is not necessary to the validity of a marriage, even though a statute prohibits a marriage without such consent, and imposes a penalty for violation of its provisions, see *Rex v. Inhabitants of Birmingham*, 8 Barn. & C. 29; *Inhabitants of Hiram v. Pierce*, 45 Me. 367; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Hervey v. Moseley*, 7 Gray, 479; *Goodwin v. Thompson*, 2 G. Greene (Iowa) 329; *Smyth v. State*, 13 Ark. 696; *Holtz v. Dick*, 42 Ohio St. 23; *Wyckoff v. Boggs*, 7 N. J. Law, 138; *Hargroves v. Thompson*, 31 Miss. 211; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; *Hunter v. Milam* (Cal.) 41 Pac. 332. But see *In re McLaughlin's Estate*, 4 Wash. St. 570, 30 Pac. 651. That solemnization before a qualified minister or particular magistrate is not necessary to the validity of a marriage, though a statute declares that only ministers and magistrates shall be competent to perform the marriage ceremony, see *Meister v. Moore*, 96 U. S. 76; *Town of Londonderry v. Town of Chester*, 2 N. H. 268; *Campbell's Adm'r v. Gullatt*, 43 Ala. 57; *Carmichael v. State*, 12 Ohio St. 553; *Holder v. State* (Tex. Cr. App.) 29 S. W. 793; *Hunter v. Milam* (Cal.) 41 Pac. 332. And as to want of a license required by statute not rendering a marriage invalid, see *Meister v. Moore*, 96 U. S. 76; *Teter v. Teter*, 101 Ind. 129; *Campbell's Adm'r v. Gullatt*, 43 Ala. 57; *Askew v. Dupree*, 30 Ga. 173; *Hargroves v. Thompson*, 31 Miss. 211; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *Connors v. Connors* (Wyo.) 40 Pac. 966; *Chapman v. Chapman* (Tex. Civ. App.) 32 S. W. 564.

¹⁰² *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Meister v. Moore*, 96 U. S. 76; *Johnson v. Johnson's Adm'r*, 30 Mo. 72; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Fenton v. Reed*, 4 Johns. (N. Y.) 52; *Bowman v. Bowman*, 24 Ill. App. 165; *Port v. Port*, 70 Ill. 484; *Dickerson v. Brown*, 49 Miss. 357; *Guardians of the Poor v. Nathans*, 2 Brewst. (Pa.) 149. And see the cases above cited.

agreement to marry in the future, followed by intercourse in pursuance of the agreement, constitutes a common-law marriage in those states in which no formalities of celebration are necessary, on the theory that a presumption of present consent arises from the fact of intercourse. This is known as "marriage per verba de futuro cum copula."¹⁰³ An informal marriage, to be valid, must come within one or the other of these two classes. The numerous cases in which the question of the validity of informal marriages has arisen have turned principally on matters of evidence, as to whether the circumstances of the case and the conduct of the parties showed present consent.

A marriage per verba de præsenti may be valid, though no express words were used. All that is necessary is that the parties shall intend to marry, and that their intention shall appear either by their words, or by their conduct.¹⁰⁴ "As the law stands, a valid marriage, to all intents and purposes, is established by proof of an actual contract per verba de præsenti between persons of opposite sexes, capable of contracting, to take each other for husband and wife; especially where the contract is followed by cohabitation. No solemnization or other formality, apart from the agreement itself, is necessary. Nor is it essential to the validity of the contract that it should be made before witnesses."¹⁰⁵ The agreement being the essential element in these marriages, it may, like other agreements, be proven by conduct, as well as by words, and by the testimony of the parties themselves, as well as by the testimony of third persons.

When the consent to marry is manifested by words de præsenti,

¹⁰³ Reg. v. Millis, 10 Clark & F. 534; Port v. Port, 70 Ill. 484; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737; Hebblethwaite v. Hepworth, 98 Ill. 126; and cases above cited. See quotation from Cartwright v. McGown, post, p. 34. Contra, Cheney v. Arnold, 15 N. Y. 345.

¹⁰⁴ Schouler, Dom. Rel. § 26; Dalrymple v. Dalrymple, 2 Hagg. Consist. 54; Francis v. Francis, 31 Grat. (Va.) 283; Hicks v. Cochran, 4 Edw. Ch. (N. Y.) 107; Van Tuyl v. Van Tuyl, 57 Barb. (N. Y.) 237; Dickerson v. Brown, 49 Miss. 357; Bowman v. Bowman, 24 Ill. App. 165; Gise v. Com., 81 Pa. St. 428; Bowman v. Bowman, 24 Ill. App. 165; Guardians of the Poor v. Nathans, 2 Brewst. (Pa.) 149.

¹⁰⁵ Van Tuyl v. Van Tuyl, 57 Barb. (N. Y.) 237.

a present assumption of the marriage status is necessary.¹⁰⁶ This applies in all cases,—not only where there are *verba de presenti* without copula, but also where there is copula following an engagement to marry. The marriage must be consummated at the time of the agreement, and not be left for the future. It is not sufficient to agree to present cohabitation, and a future regular marriage when more convenient, or when a husband or wife shall die, or when a license can be obtained, or a ceremony can be performed; but there must be a present marriage by the agreement.¹⁰⁷ Though a present assumption of the marriage status is necessary to constitute a valid common-law marriage, it must not be supposed that intercourse is necessary. The marriage need not be consummated by intercourse, for *consensus, non concubitus, facit matrimonium*.¹⁰⁸

It is a question of fact, to be determined from all the circumstances of each case, whether the parties intended marriage or not. "A mere carnal commerce, without the intention of cohabiting and training up children, would not constitute marriage under any circumstances."¹⁰⁹ But the presumption is always in favor of marriage, and acts and conduct which have the appearance of marriage will be construed as such, unless there are circumstances which preclude that construction.¹¹⁰ So, if two persons live together as husband and wife, holding themselves out to the public as such, and gain the reputation in the community of being married, this

¹⁰⁶ *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 739.

¹⁰⁷ *Cartwright v. McGown*, *supra*; *Reg. v. Millis*, 10 Clark & F. 534; *Robertson v. State*, 42 Ala. 509; *Clark v. Field*, 13 Vt. 460; *Duncan v. Duncan*, 10 Ohio St. 182; *Peck v. Peck*, 12 R. I. 485; *Beverson's Estate*, 47 Cal. 621; *Fryer v. Fryer*, Rich. Eq. Cas. (S. C.) 85; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235.

¹⁰⁸ *Shelf*, Mar. & Div. 5-7; *Dalrymple v. Dalrymple*, *supra*; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *Port v. Port*, 70 Ill. 484; *Peck v. Peck*, 12 R. I. 485; *Hebblethwaite v. Hepworth*, 98 Ill. 126.

¹⁰⁹ *Lindo v. Belisario*, 1 Hagg. Consist. 216; *Com. v. Stump*, 53 Pa. St. 132; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235.

¹¹⁰ *Piers v. Piers*, 2 H. L. Cas. 331; *Teter v. Teter*, 101 Ind. 129; *Dickerson v. Brown*, 49 Miss. 357; *State v. Worthingham*, 23 Minn. 528; *Hynes v. McDermott*, 91 N. Y. 451; *Guardians of the Poor v. Nathans*, 2 Brewst. (Pa.) 149; *Blanchard v. Lambert*, 43 Iowa, 228.

is very generally accepted as *prima facie* proof of marriage.¹¹¹ "Where parties competent to contract have agreed to marry at some future time, if they have copula, which is lawful only in the married state, in the absence of any evidence to the contrary, they will be presumed to have become actually married by taking each other for husband and wife, and to have changed their future promise to marry to one of present marriage. In such a case the copula will be presumed to have been allowed on the faith of the marriage promise, and that the parties at the time of such copula accepted each other as man and wife."¹¹² This kind of marriage must be distinguished from cases of seduction or sexual intercourse followed by a promise of marriage in cases where the intercourse is illicit in its inception, and is known to be such. In such cases, as we shall presently see, the presumption is in favor of the continuance of illicit intercourse.¹¹³

The presumption of marriage from cohabitation and reputation may always be rebutted, even where it can be shown that there was an agreement to marry in the future, and that the cohabitation began subsequent to this agreement, for an executory contract to marry cannot become consummated by copula unless the parties so intend.¹¹⁴ The presumption is rebutted, for instance, by proof that the parties separated without any apparent cause, and one of

¹¹¹ 1 Fraser, Dom. Rel. 113; *De Thoren v. Attorney General*, 1 App. Cas. 686; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Green v. State*, 59 Ala. 68; *Lowry v. Coster*, 91 Ill. 182; *Proctor v. Bigelow*, 38 Mich. 282; *Redgrave v. Redgrave*, 38 Md. 93; *Jones v. Reddick*, 79 N. C. 290; *Com. v. Stump*, 53 Pa. St. 132; *Hicks v. Cochran*, 4 Edw. Ch. (N. Y.) 107; *White v. White*, 82 Cal. 427, 23 Pac. 276; *Richard v. Brehm*, 73 Pa. St. 140; *Fornshill v. Murray*, 1 Bland (Md.) 479; *Taylor v. Swett*, 3 La. 33; *Arthur v. Broadnax*, 3 Ala. 557; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Allen v. Hall*, 2 Nott & McC. (S. C.) 114; *Holmes v. Holmes*, 6 La. 463; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460; *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Miss.) 9.

¹¹² *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737.

¹¹³ Note 116, *infra*.

¹¹⁴ *Forbes v. Countess of Strathmore*, Ferg. Const. 113; *Reg. v. Mills*, 10 Clark & F. 534, 782; *Robertson v. State*, 42 Ala. 509; *Port v. Port*, 70 Ill. 484; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Peck v. Peck*, 12 R. I. 488; *Stoltz v. Doering*, 112 Ill. 234; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235.

them married some other person.¹¹⁵ No presumption of marriage can arise from the continuance of cohabitation known to be meretricious or adulterous in its inception, the presumption being that it continued so; and the burden is on the one who claims that there has been an informal marriage to show an agreement between the parties.¹¹⁶ "If the cohabitation was in its inception illicit, the presumption of the innocence and morality of the parties is at once rebutted and overcome; and, without proof of a change in their relation to each other, it will be presumed that this continuance of the connection of the parties is of the same character."¹¹⁷

ANNULMENT AND AVOIDANCE OF MARRIAGES.

22. Where a marriage is absolutely void, a suit to annul it is not necessary; but such a suit will lie, and is advisable, in order to have the invalidity of the marriage determined judicially.
23. Where a marriage, though not absolutely void, is voidable by the act of the parties, or one of them, as in case of nonage, fraud, duress, etc., a suit to annul the marriage is not necessary; but it may be brought, as in the case of a void marriage, and is advisable.
24. In other cases of voidable marriage, a suit to annul the marriage is necessary. It cannot be attacked collaterally.
25. If a marriage is absolutely void, it may be annulled at any time, and may be attacked collaterally as

¹¹⁵ *Weatherford v. Weatherford*, 20 Ala. 548; *Jones v. Jones*, 48 Md. 391.

¹¹⁶ *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Duncan v. Duncan*, 10 Ohio St. 181; *Cheney v. Arnold*, 15 N. Y. 345; *Floyd v. Calvert*, 53 Miss. 37; *Randlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Harbeck v. Harbeck*, 102 N. Y. 714, 7 N. E. 408; *Appeal of Reading Fire Ins. & Trust Co.*, 113 Pa. St. 204, 6 Atl. 62; *In re Gall's Will (Surr.)* 9 N. Y. Supp. 466; *Cram v. Burnham*, 5 Greenl. (Me.) 213; *Peck v. Peck*, 12 R. I. 485; *Port v. Port*, 70 Ill. 484; *Stans v. Baitey*, 9 Wash. St. 115, 37 Pac. 316; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234; *Pearce v. Pearce (Ky.)* 16 S. W. 271.

¹¹⁷ *Cartwright v. McGown*, *supra*.

well as directly, and by third persons as well as by the parties. But if a marriage is merely voidable, it must be annulled, if at all, in the lifetime of the parties.

26. Annulment of a voidable marriage renders it void ab initio, unless it is otherwise provided by statute.

Suits to annul a marriage must be distinguished from suits for a divorce, which will be considered in a subsequent chapter. A suit for a divorce supposes the existence of a valid marriage, and a decree of divorce annuls existing rights. A suit for nullity of a marriage, on the other hand, is on the theory that there is no valid marriage at all, and a decree of nullity declares that rights supposed to have arisen from the attempted marriage never in fact existed. A decree of divorce annuls a marriage only from the time it is entered. A decree of nullity, unless a contrary rule is established by statute, annuls the marriage ab initio, and, in effect, declares that there never has been any marriage.¹¹⁸

As has been heretofore shown, a marriage may be absolutely void, or it may be voidable. And voidable marriages may be voidable by the act of the parties themselves, without going into court and obtaining a decree of nullity; or they may be voidable only by a decree of the court, according to the ground of objection. Thus a marriage between persons, one of whom has a spouse under a prior, valid, and undissolved marriage, still living, is not merely voidable, but absolutely void. The same is true generally of a marriage between persons under the disability of civil conditions, and of marriage by a child under seven years of age. On the other hand, a marriage between persons within the prohibited degrees of relationship is not void, but voidable, and is voidable by a decree of the court only, and not by the mere act of the parties themselves. The same is true of marriages voidable because of impotence. Again, there are some marriages that are voidable by the mere act of one

¹¹⁸ Stew. Mar. & Div. § 141; Rawdon v. Rawdon, 28 Ala. 565; Powell v. Powell, 18 Kan. 371; Succession of Minvielle, 15 La. Ann. 342; Lincoln v. Lincoln, 6 Rob. (N. Y.) 525; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; Smith v. Moorehead, 6 Jones, Eq. (N. C.) 360; Patterson v. Gaines, 6 How. 550, 582.

or of both of the parties, without the necessity for intervention of the court by decree of nullity; and there are some marriages which are voidable in this way at the option of one of the parties only, the other party having no right to avoid it. Thus, as has been shown, where one of the parties is under the age of consent, and above the age of seven, the marriage is not absolutely void, but is voidable by the act of the parties. Either party may avoid it by repudiating it, without going into court and obtaining a decree of nullity. In such a case the marriage is voidable by either party, though one of them may have been above the age of consent when it took place; and it is voidable at any time, whether before or after reaching the age of consent, so long as it has not been recognized and ratified. If ratified after reaching the age of consent, it is absolutely binding, and no longer voidable. So where one of the parties was induced to enter into a marriage by fraud or duress, so that it is invalid, it is not absolutely void, but voidable merely; but it is voidable by the mere act of the party deceived or coerced, without the necessity for a decree of nullity. The marriage is voidable at the option of the party deceived or coerced only, and cannot be avoided by the other party, nor by third persons. Nor can it be avoided by the party deceived or coerced, if, after discovery of the fraud, or after being relieved from the duress, he ratified it. After ratification it is absolutely binding on both parties. What has been said applies also to marriages entered into under such an error as renders it voidable. And, as has been seen, there is some authority for applying the doctrine to marriages entered into by a lunatic or idiot, though, by the weight of authority, such marriages are not merely voidable, but absolutely void.

Where a marriage is merely voidable, and voidable by a decree of nullity only, it is valid, unless a decree is obtained; and the decree must be made, if at all, during the lives of both parties.¹¹⁹ Until it is made, the marriage is valid for all purposes.¹²⁰ The children

¹¹⁹ 1 Bl. Comm. 434; *Bonham v. Badgley*, 2 Gilman (Ill.) 622; *Cavell v. Prince*, L. R. 1 Exch. 246; *White v. Lowe*, 1 Redf. Sur. (N. Y.) 376; *Harrison v. State*, 22 Md. 468; *Combs v. Combs*, 17 Abb. N. C. 265; *Gathings v. Williams*, 5 Ired. (N. C.) 487; *Fornhill v. Murray*, 1 Bland (Md.) 479.

¹²⁰ *Elliott v. Gurr*, 2 Phillim. Ecc. 16.

are legitimate;¹²¹ the parties are entitled, respectively, to curtesy and dower; and all the other incidents of a valid marriage attach.¹²² After a decree of nullity, however, in the lifetime of the parties, the marriage is void ab initio, and not merely from the date of the decree.¹²³ The children are rendered illegitimate,¹²⁴ the parties have no rights in each other's property,¹²⁵ and communications formerly made between them are no longer privileged.¹²⁶ In other words, it is just as if no marriage had ever taken place. The same doctrines apply to a great extent to marriages voidable by the act of the parties, without a decree of nullity.

Where a marriage is absolutely void, and not merely voidable, a suit to annul it is not necessary. The question of its validity may be raised at any time, either before or after the death of the parties, or of either of them, and collaterally as well as directly, and by strangers as well as by the parties themselves.¹²⁷ No rights whatever can arise out of a marriage that is absolutely void.

In many respects the doctrines above stated have been changed by statutes in the different states, and it is never safe to assume that the common-law rules are in force, without first consulting the statute.¹²⁸

¹²¹ 2 Burn. Ecc. Law (Phillim. Ed.) tit. "Marriage"; 1 Bish. Mar., Div. & Sep. § 272.

¹²² 1 Bl. Comm. 434; *Rennington v. Cole*, Noy, 29.

¹²³ *Aughtie v. Aughtie*, 1 Phillim. Ecc. 201; *Perry v. Perry*, 2 Paige (N. Y.) 501.

¹²⁴ *Aughtie v. Aughtie*, 1 Phillim. Ecc. 201.

¹²⁵ *Aughtie v. Aughtie*, 1 Phillim. Ecc. 201; *Kelly v. Scott*, 5 Grat. (Va.) 479; *Sellars v. Davis*, 4 Yerg. (Tenn.) 503.

¹²⁶ *Wells v. Fletcher*, 5 Car. & P. 12.

¹²⁷ *Shelf. Mar. & Div.* 479; 1 Bish. Mar., Div. & Sep. § 258; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Wilson v. Brockley*, 1 Phillim. Ecc. 132; *Ferlat v. Gojon*, Hopk. Ch. (N. Y.) 478, 493; *Reeves v. Reeves*, 54 Ill. 332; *Hantz v. Sealy*, 6 Bin. (Pa.) 405; *Gathings v. Williams*, 5 Ired. (N. C.) 487; *Hemming v. Price*, 12 Mod. 432; *Tefft v. Tefft*, 35 Ind. 44; *Patterson v. Gaines*, 6 How. 550, 592; *Fornshill v. Murray*, 1 Bland (Md.) 479; *Town of Mountholly v. Town of Andover*, 11 Vt. 226; *Rawdon v. Rawdon*, 28 Ala. 565; *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. 363; *Higgins v. Breen*, 9 Mo. 497; *Smart v. Whaley*, 6 Smedes & M. (Miss.) 308; *In-*

¹²⁸ As to the construction of statutes, see post, p. 43.

The fact that a marriage is absolutely void, or is voidable by the act of the parties themselves, does not prevent the bringing of a suit to have it annulled, for the purpose of having its invalidity judicially established, and to fix the status of the parties. Such a suit is always advisable. As was said by Chancellor Kent, "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary, yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."¹²⁹

Jurisdiction.

Since no courts in the United States have succeeded to the jurisdiction of the ecclesiastical courts,¹³⁰ and even courts of equity, as such, have no jurisdiction in cases of canonical disabilities,¹³¹ suits to annul a marriage on these grounds depend entirely upon statutes in this country; and the same has been held to be true in case of prior marriage of one of the parties.¹³² Most states have statutes giving jurisdiction in suits for nullity of marriage on the ground of consanguinity, but not expressly on the ground of impotence.¹³³ Impotence, however, is made a ground for divorce in most states, and it has been held by some courts that jurisdiction of suits for nullity on account of impotence is impliedly conferred with the divorce jurisdiction, divorce being broadly construed to include nullity.¹³⁴

habitants of Unity v. Inhabitants of Belgrade, 76 Me. 419; *Williams v. State*, 44 Ala. 24.

¹²⁹ 2 Kent, Comm. 76; *Hayes v. Watts*, 3 Phillim. Ecc. 44; *Pertreis v. Ton-dear*, 1 Hagg. Consist. 138; *Crump v. Morgan*, 3 Ired. Eq. (N. C.) 91.

¹³⁰ *Anon.*, 24 N. J. Eq. 19; *Peugnet v. Phelps*, 48 Barb. (N. Y.) 566; *Burtis v. Burtis*, Hopk. Ch. (N. Y.) 557, 565; *Perry v. Perry*, 2 Paige (N. Y.) 501; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551; *Le Barron v. Le Barron*, 35 Vt. 365.

¹³¹ *Anon.*, 24 N. J. Eq. 19; *Burtis v. Burtis*, Hopk. Ch. (N. Y.) 557, 565; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551.

¹³² *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837.

¹³³ *Stim. Am. St. Law*, § 6112.

¹³⁴ *Stim. Am. St. Law*, § 6113; *Mattison v. Mattison*, 1 Strobb. Eq. (S. C.) 387; *Johnson v. Kincade*, 2 Ired. Eq. (N. C.) 470; *Le Barron v. Le Barron*, 35 Vt. 365; *Head v. Head*, 2 Ga. 191; *Hamaker v. Hamaker*, 18 Ill. 137;

Where a marriage is invalid on other grounds than because of canonical disabilities, as on the ground of want of consent, arising from insanity, fraud, duress, error, or any other cause, or perhaps on the ground of some civil disability, like prior marriage, civil condition, or nonage, or on the ground of illegal celebration, it is held in this country that a suit to annul the marriage will lie, independently of any statutory authority therefor. Such suits are held to be within the ordinary jurisdiction of courts of equity.¹³⁵

POWER OF LEGISLATURE TO VALIDATE MARRIAGE.

27. The legislature has the power to confirm and make valid marriages which were before voidable.

This question arose, and was carefully considered by the court of appeals of Maryland, in *Harrison v. State*,¹³⁶ where the validity of a statute validating marriages between persons related within the prohibited degrees of consanguinity and affinity, and which were before voidable, was attacked as unconstitutional as applied to prior marriages. The act was upheld, however, as a valid exercise of

Chase v. Chase, 55 Me. 21; *J. G. v. H. G.*, 33 Md. 401; *Bascomb v. Bascomb*, 25 N. H. 267.

¹³⁵ *Rawdon v. Rawdon*, 28 Ala. 565, 567; *Tefft v. Tefft*, 35 Ind. 44, 50; *Powell v. Powell*, 18 Kan. 371, 373; *Bassett v. Bassett*, 9 Bush (Ky.) 696, 697; *Fornshill v. Murray*, 1 Bland (Md.) 479, 483; *Helms v. Franciscus*, 2 Bland (Md.) 544, 579; *True v. Ranney*, 21 N. H. 52, 53; *Keyes v. Keyes*, 22 N. H. 553, 558; *McClurg v. Terry*, 21 N. J. Eq. 226, 229; *Anon.*, 24 N. J. Eq. 19, 20; *Carris v. Carris*, Id. 516; *Selah v. Selah*, 23 N. J. Eq. 185; *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343, 345; *Burtis v. Burtis*, 1 Hopk. Ch. (N. Y.) 557, 567; *Perlat v. Gojon*, Id. 478, 494; *Perry v. Perry*, 2 Paige (N. Y.) 501, 503; *Scott v. Schufeldt*, 5 Paige (N. Y.) 43, 44; *Johnson v. Kincaide*, 2 Ired. Eq. (N. C.) 470, 475; *Crump v. Morgan*, 3 Ired. Eq. (N. C.) 91, 98; *Waymire v. Jetmore*, 22 Ohio St. 271, 274; *Jelineau v. Jelineau*, 2 Desaus. Eq. (S. C.) 45, 50; *Almond v. Almond*, 4 Rand. (Va.) 662, 666; *Clark v. Field*, 13 Vt. 460, 465; *Le Barron v. Le Barron*, 35 Vt. 365, 366.

¹³⁶ 22 Md. 468. "Such legislation," it was said, "is neither extraordinary, unconstitutional, nor unjust, but conservative, essential, and salutary; being the only adequate means of healing or preventing inevitable wrongs, public and private."

legislative power, like special acts of divorce. There are decisions in many of the other states to the same effect.¹³⁷

PRESUMPTION AND BURDEN OF PROOF.

28. A marriage is presumed to be valid until the contrary is made to appear.

When the celebration of a marriage is once shown, the law will presume, in the absence of evidence to the contrary, the mutual consent of the parties, the reality of consent, the capacity of the parties, and in fact everything essential to the validity of the marriage, and the burden of proving facts rendering it invalid is upon him who seeks to avoid it.¹³⁸

Since, therefore, the presumption is always in favor of the validity of a marriage, a person who attacks a marriage as invalid on the ground that one of the parties had been previously married to another person does not fully meet the burden of proof that is upon him by showing that there was a former valid marriage as he contends; but he must go further, and show affirmatively that the marriage had not been dissolved, either by the death of the other party, or by a decree of divorce. Death of the former spouse, or a divorce, will be presumed, unless the contrary is made to appear, and the burden is on the person attacking the second marriage to rebut this presumption. "When it is shown that a marriage has been consummated in accordance with the forms of law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations; and the fact, if shown, that either or both of the parties had been previously married, and, of course, at a former time having a wife or husband living, does not destroy the *prima facie* legality of the last marriage. The natural inference in such cases is that the former marriage has been legally dissolved, and the burden of showing that it has not been,

¹³⁷ *Inhabitants of Town of Goshen v. Inhabitants of Stonington*, 4 Conn. 209; *Baity v. Cranfill*, 91 N. C. 293; *Moore v. Whitaker*, 2 Har. (Del.) 50.

¹³⁸ *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177; *Fleming v. People*, 27 N. Y. 329; *Strode v. Magowan's Heirs*, 2 Bush (Ky.) 627; *People v. Calder*, 30 Mich. 85; *State v. Kean*, 10 N. H. 347; and cases hereafter referred to.

rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved, either by death of their former consort or by decree of court, in order to protect themselves against a bill for divorce or a prosecution for bigamy."¹³⁹

The question of presumption, in cases where it is claimed that an informal marriage was consummated, has been considered in treating of informal marriages.¹⁴⁰

¹³⁹ *Harris v. Harris*, 8 Ill. App. 57. That a divorce will be presumed, see *Schmisser v. Beattie*, 147 Ill. 210, 35 N. E. 525; *Harvey v. Carroll*, 5 Tex. Civ. App. 324, 23 S. W. 713; *Squire v. State*, 46 Ind. 459; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Blanchard v. Lambert*, 43 Iowa, 228; *Klein v. Laudman*, 29 Mo. 259; *Hull v. Rawls*, 27 Miss. 471; *McCarty v. McCarty*, 2 Strobb. (S. C.) 6; *Carroll v. Carroll*, 20 Tex. 731; *In re Edwards' Estate*, 58 Iowa, 431, 10 N. W. 793; *Welning v. Teeple* (Ind. Sup.) 41 N. E. 600. That death of a former husband or wife will be presumed, though absent for less than the time necessary to raise a legal presumption of death, see *Dixon v. People*, 18 Mich. 84; *Com. v. Boyer*, 7 Allen (Mass.) 306; *Rex v. Inhabitants of Twynning*, 2 Barn. & Ald. 386; *Greensboro v. Underhill*, 12 Vt. 604; *Harris v. Harris*, 8 Ill. App. 57; *Yates v. Houston*, 3 Tex. 449; *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232. In the case of *Greensboro v. Underhill*, supra, the court say: "Is the intermarriage of Burdick with the pauper in 1836 rendered illegal and void from the fact of her intermarriage with Hyland in 1834, who, after a short cohabitation with her, absconded, and has not since been heard of? To render the second marriage illegal and void, we must presume the continuance of the life of Hyland down to the time of the second marriage; and though, as a general principle, we are to presume the continuance of life for the space of seven years, still, when this presumption is brought into conflict with other presumptions in law, it may be made to yield to them. We are in all cases to presume against the commission of crime, and in favor of innocence; and the result will be, if we suffer this presumption to yield to the other, we, by presumption alone, pronounce the second marriage illegal and void, and the parties guilty of a heinous crime. * * * In the case of *Rex v. Inhabitants of Twynning*, 2 Barn. & Ald. 386, the woman married again within the space of 12 months after her husband had left the country, and yet the presumption of innocence was held to preponderate over the usual presumption of the continuance of life; and this, too, in a case involving a question of settlement." Evidence that the records of the court of the county or counties in which the parties always lived show no divorce is sufficient to rebut the presumption

¹⁴⁰ Ante, pp. 33-35.

CONSTRUCTION OF STATUTES.

29. Statutes governing marriages are to be construed in the light of the law as it existed prior to their enactment; and, unless the intention of the legislature to that effect is clear, they will not be held to avoid marriages that were valid at common law, or to otherwise change the common law.

It has been seen, in treating of formalities in the celebration of a marriage, that at common law none were required, and that where the legislature prescribes formalities, as where it requires a license, or consent of parents, or designates persons who shall be competent to perform the marriage ceremony, the statute is not to be construed as invalidating common-law, informal marriages, unless it expressly declares that failure to observe the formalities prescribed shall render the marriage void.¹⁴¹ An intent to change the common law must be clear. "Though in most, if not all, the United States, there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage."¹⁴² "A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of banns, or be attested to by witnesses. Such formal provisions may be construed as merely

of a divorce. *Schmisseur v. Beatrice*, supra; *Barnes v. Barnes*, 90 Iowa, 282, 57 N. W. 851.

¹⁴¹ Ante, p. 30, and cases there collated. But see *In re McLaughlin's Estate*, 4 Wash. St. 570, 30 Pac. 651.

¹⁴² 2 Greenl. Ev. § 460, quoted with approval in *Meister v. Moore*, 96 U. S. 79.

directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity.”¹⁴³

On the same principle of construction, it has been held that a statute which declares a marriage void (as for canonical disabilities), but does not express any intention on the part of the legislature to change the pre-existing law, will not be construed as rendering absolutely void a marriage which was formerly only voidable by a decree of nullity in the lifetime of the parties. It was said, in a case holding this principle: “The disabilities enumerated are all canonical disabilities, and not those known to the law as ‘civil disabilities.’ Canonical disabilities were such as render the marriage voidable, and not void. They require the judgment of an ecclesiastical court, during the lives of the parties, to make them effective as causes of a divorce. On the other hand, civil disabilities, such as arose *pro defectu consensus*, for want of a capacity to contract, or mental infirmity, *ipso facto* avoided marriage without the action of the courts. When the legislature declared by statute that persons laboring under canonical disabilities should not marry under certain penalties, but such marriages should be void, and gave jurisdiction to the general court to hear and determine upon such marriages, it is to be supposed they designed to put persons laboring under such disabilities in the same position they were at common law,—viz. they should be void, when established by the judgment of a court, in the life of the parties to the marriage,—not to confound canonical and civil disabilities, and destroy the distinction between them.”¹⁴⁴

So, also, where a statute declared that persons under the age of 17 should not be capable of marrying, and that the marriage

¹⁴³ *Meister v. Moore*, 96 U. S. 76. And see cases cited ante, p. 30.

¹⁴⁴ *Harrison v. State*, 22 Md. 468. And see *Bonham v. Badgley*, 7 Ill. 622; *Parker's Appeal*, 44 Pa. St. 309; *Com. v. Perryman*, 2 Leigh (Va.) 717; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551.

of persons incapable of marrying should be void, it was held that a marriage by a boy 16 years of age could be confirmed and ratified by him on reaching his seventeenth year.¹⁴⁵ The court construed the statute as not changing the common-law rule as to the effect of marriages by persons under the age of consent.

CONFLICT OF LAWS.

30. As a rule, the validity of a marriage is determined by the law of the place where it was entered into.

It is well settled that, as a general rule, the validity of a marriage is to be determined by the law of the place where it is entered into; so that, as it is often expressed, a marriage that is valid where made is valid everywhere, and a marriage that is void where made is void everywhere.¹⁴⁶ It has even been held, in most states, that where the parties go out of the state in which they live, for the purpose of evading its laws,—such as laws requiring consent of parents, or laws prohibiting divorced persons from marrying,—the marriage will not be held invalid on their return into the state, if it is valid in the state or country in which it took place;¹⁴⁷ but on this question some of the courts have taken a contrary view.¹⁴⁸

¹⁴⁵ *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496. And see *Hervey v. Moseley*, 7 Gray (Mass.) 479; *Inhabitants of Hiram v. Pierce*, 45 Me. 367; *Holiz v. Dick*, 42 Ohio St. 23; and cases above cited.

¹⁴⁶ *Roach v. Garvan*, 1 Ves. Sr. 159; *Warrender v. Warrender*, 2 Clark & F. 488; *Harding v. Alden*, 9 Greenl. (Me.) 140; *In re Lum Lin Ying*, 59 Fed. 682; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Dumaresly v. Fishly*, 3 A. K. Marsh. (Ky.) 368; *True v. Ranney*, 21 N. H. 52; *Brinkley v. Attorney General*, 15 Prob. Div. 76; *Hutchins v. Kimmell*, 31 Mich. 126; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Moore v. Hegeman*, 92 N. Y. 521; *Thorp v. Thorp*, 90 N. Y. 602; *Fornshill v. Murray*, 1 Bland (Md.) 479; *Herbert v. Herbert*, 3 Phillim. Ecc. 58; *Roche v. Washington*, 19 Ind. 53; *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Com. v. Graham*, 157 Mass. 75, 31 N. E. 706; *Inhabitants of Hiram v. Pierce*, 45 Me. 367; *Johnson v. Johnson's Adm'r*, 30 Mo. 72; *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752.

¹⁴⁷ *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706; *Thorp v. Thorp*, 90 N. Y. 602; *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 Pick. (Mass.) 506; *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157; *Courtright v. Courtright*, 26 Wkly. Law Bul. 309.

¹⁴⁸ *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411; *Babin v. Le Blanc*, 12 La.

A marriage invalid in the country or state where it was made may be valid as a common-law marriage in another state. Thus in a New York case it was held that a marriage between a man and a woman whose former husband had not been heard from or known to be living for more than five years prior to such marriage, solemnized in Canada, and void under the laws of that country, because of the possible existence of such former husband, could be treated in New York, where both the parties were then domiciled, as a marriage *per verba de præsenti*, and valid when followed by cohabitation as husband and wife.¹⁴⁹

To the rule that the validity of a marriage is to be determined by the law of the place where it was entered into, there are some exceptions. For instance, a marriage entered into in one state or country will not be recognized as valid by the courts of another state or country, if it is opposed to the morality, religion, or municipal institutions of the latter. Thus no court in this country would uphold a bigamous marriage or an incestuous marriage between brother and sister, though they might be valid in the country in which they were entered into.¹⁵⁰ Nor will the *lex loci* prevail if it recognizes as valid a marriage entered into by an imbecile.¹⁵¹

Again, there are some laws of a state or country that will not necessarily be taken into consideration in another. If the law of one state prohibits a marriage between certain persons, as a penal matter, the statute is not necessarily recognized in another state, and if residents of the latter go into the former and marry contrary to that law, intending to return, and in fact returning, to the state of their residence, where the marriage would have been valid, the marriage will be there upheld. Thus it was held by the Louisiana court that the prohibition of the New York statute to the effect that no second or other subsequent marriage should be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage was dissolved

Ann. 367; *Maillefer v. Saillot*, 4 La. Ann. 375; *Saul v. His Creditors*, 5 Mart. (La.; N. S.) 569; *Succession of Caballero*, 24 La. Ann. 573.

¹⁴⁹ *Wilcox v. Wilcox*, 46 Hun (N. Y.) 32. And see cases in note 146, *supra*.

¹⁵⁰ *True v. Ranney*, 21 N. H. 52; *Conway v. Beazley*, 3 Hagg. Ecc. 639; *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Roche v. Washington*, 19 Ind. 53.

¹⁵¹ *True v. Ranney*, *supra*.

on the ground of adultery, had no extraterritorial effect, being a penal statute, and that it could not be given the effect of annulling a marriage between persons at the time residing abroad, and intending to continue to reside abroad, notwithstanding it was solemnized in New York.¹⁵² So, also, in a Maine case it was held that where a husband obtained a divorce from his wife for her fault, by the decree of a court of another state, which prohibited the wife from remarrying, the wife still residing in Maine, the prohibition to remarry was in the nature of a penalty, and had no force as a disability to remarry in another state, and therefore such disability did not attach to the person of the wife in Maine.¹⁵³

Although an Indian tribe, recognized as such, may be located within state lines, yet so long as their tribal customs are adhered to, and the federal government manages their affairs by agents, they are not to be regarded as subject to state laws, so far as marriage is concerned; and therefore marriages between members of Indian tribes in tribal relations, valid by the customs and laws of the tribe, and contracted at a time when there was no law of the United States on the subject of Indian marriages, must be recognized as valid by the state courts, though not in compliance with the laws of the state.¹⁵⁴

¹⁵² Succession of Hernandez, 46 La. Ann. 962, 15 South. 461.

¹⁵³ *Inhabitants of Phillips v. Inhabitants of Madrid*, 83 Me. 205, 22 Atl. 114. It was also held in this case that the prohibition to marry contained in the statutes of one state did not apply to divorces granted in another state.

¹⁵⁴ *Boyer v. Dively*, 58 Mo. 529; *Kobogum v. Iron Co.*, 76 Mich. 498, 43 N. W. 602, and cases cited; *Earl v. Godley*, 42 Minn. 361, 44 N. W. 254; *Johnson v. Johnson's Adm'r*, 30 Mo. 72; *First Nat. Bank v. Sharpe* (Tex. Civ. App.) 33 S. W. 676. But compare *Roche v. Washington*, 19 Ind. 53; *State v. Tacha-na-tah*, 64 N. C. 614. A marriage contracted according to the customs of an Indian tribe need not be contracted in the territory of the tribe, to be valid. *La Riviere v. La Riviere*, 97 Mo. 80, 10 S. W. 840. But see *Roche v. Washington*, *supra*.

CHAPTER II.

PERSONS OF THE SPOUSES AS AFFECTED BY COVERTURE.

- 31. Right to Cohabitation and Intercourse.
- 32-33. Restraint and Correction of Wife.
- 34. Right to Determine Family Domicile.
- 35-36. Crimes of Married Women.
- 37. Crimes as between Husband and Wife.
- 38-41. Torts of Married Women.
- 42-43. Torts as between Husband and Wife.
- 44. Torts against Married Women.
- 45-46. Actions for Enticing, Harboring, or Alienation of Affection.
- 47. Action for Criminal Conversation.

“By marriage,” says Blackstone, “the husband and wife are one person in law. The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called, in our law French, a ‘feme covert,’—‘*fœmina viro co-operta*’; is said to be ‘covert baron,’ or under the protection and influence of her husband, her baron or lord; and her condition during her marriage is called her ‘coverture.’ Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.”¹

RIGHT TO COHABITATION AND INTERCOURSE.

- 31. Marriage mutually entitles the husband and wife to cohabitation and intercourse, but in this country there is no way in which this right can be judicially enforced.

Marriage entitles the husband and wife to each other’s society; that is, they are mutually entitled to cohabitation. And, in addi-

¹ 1 Bl. Comm. 442.

tion to this, they are mutually entitled to sexual intercourse.² The law, in this country at least, cannot, as could be done in England, enforce the right to cohabitation and intercourse in a suit for restitution of conjugal rights.³ But the right is essential to the marriage state, and is the basis of many of the personal rights of the spouses. It is recognized by the law in many ways. Thus a promise by a husband to his wife to pay her money if she will cohabit with him, or permit him to have sexual intercourse, would be void for want of consideration, as the only consideration therefor is the doing by the wife of something which she is already bound in law to do.⁴ Other illustrations of the recognition of the right to cohabitation and intercourse are in the fact that a marriage may be annulled on the ground of impotence existing at the time of the marriage, that desertion is very generally made a ground for divorce, and that it is not rape for a husband to have intercourse with his wife by force, and against her will. While a husband is thus entitled to sexual intercourse with his wife, he cannot compel her to submit when not in a condition to do so, as where she is ill. Nor can he compel her to submit to excessive intercourse, endangering her health, or to intercourse with him while he is diseased. This would be cruelty, and in some states a ground for divorce.⁵

A wife may be justified, under certain circumstances, in leaving her husband, and living apart from him. Extreme cruelty or adul-

² In law "cohabitation" is properly used to designate the living together of a man and woman as husband and wife, though the term is often erroneously used in the sense of sexual intercourse. Properly speaking, "cohabitation" does not necessarily imply sexual intercourse. 1 Bish. Mar., Div. & Sep. § 1669, and note; *Yardley's Estate*, 75 Pa. St. 207; *Pollock v. Pollock*, 71 N. Y. 137, 141.

³ *Schouler, Husb. & W.* §§ 482, 483; 1 Bish. Mar., Div. & Sep. § 69.

⁴ *Roberts v. Frisby*, 38 Tex. 219; *Reithmaier v. Beckwith*, 35 Mich. 110. There may be circumstances under which a promise by a wife to continue to cohabit with her husband would constitute a consideration for his promise given in return. This would be so in any case where the conduct of the husband had been such as to entitle the wife to leave him. In *Phillips v. Meyers*, 82 Ill. 67, for instance, a note executed by a husband for the benefit of his wife, in consideration of her discontinuing a suit for divorce on the ground of his drunkenness and abuse, was upheld.

⁵ *Post*, p. 174.

tery on his part would justify her in taking such a course. Any cause that would entitle her to sue for a divorce would undoubtedly justify her. And, though there is some doubt on the subject, it is held in some jurisdictions that she may be so justified by causes which are not sufficient to entitle her to a divorce.⁶ In like manner, a husband may be justified in leaving his wife.⁷ The question is one of great importance; for, if either husband or wife deserts the other without justification, the statutes very generally entitle the deserted spouse to a divorce. In addition to this, there are statutes in some jurisdictions rendering a husband liable to a criminal prosecution if he abandons his wife without just cause. A deserted wife may also sue for maintenance, and she has the power to bind her husband for necessities to a much greater extent than when living with him, and being supported by him.

RESTRAINT AND CORRECTION OF WIFE.

- 32. A husband has no right to restrain his wife of her liberty, except where restraint is necessary, either:**
EXCEPTIONS—(a) To prevent her from committing a crime.
(b) To prevent her from committing adultery.
(c) Perhaps, to prevent her from committing a tort for which he, as her husband, would be liable.
(d) Perhaps, to prevent her interference with his parental authority over his children.
- 33. A husband has no right to chastise his wife in any case.**

Restraint.

The text-books generally state that the husband has the right to restrain his wife's person. Kent says that the law has given the husband a reasonable superiority and control over her person, and that he may even put gentle restraint upon her liberty.⁸ The early

⁶ *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479.

⁷ *McClurg's Appeal*, 66 Pa. St. 366.

⁸ 2 Kent, Comm. 181.

cases support this view.⁹ and the right has been recognized in a recent English case,¹⁰ where it was held that the law places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestricted intercourse with the world, by enforcing cohabitation and a common residence. Here, the wife having left her husband, he brought suit for restitution of conjugal rights, and she failed to answer. Thereupon he decoyed her to his house, and restrained her there against her will. It was held that he was justified in thus forcibly detaining her. This case, however, has been recently overruled by the court of appeal in a case where the husband, having obtained a decree for restitution of conjugal rights, caused his wife to be seized in the street, and confined in his house.¹¹ The master of the rolls said in that case: "I do not believe that an English husband has, by law, any such right over his wife's person as has been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if the wife were about immediately to do something which would be to the dishonor of her husband, as if that he saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back."

The limits of the doctrine of the husband's right of restraint over his wife are very shadowy and undefined. In this country the right has been recognized so far as to allow a husband to restrain his wife from committing a crime,¹² or from interfering with his exercise of parental authority over his children.¹³ But it is not probable that any court would go as far as the English court in the first case mentioned above, and allow a husband to restrain his wife merely to compel cohabitation with him, or to prevent her from doing acts not criminal, nor adulterous or tortious, nor in-

⁹ *Rex v. Lister*, 1 Strange, 478. In this case it was said that when a wife makes undue use of her liberty, either by squandering away the husband's estate, or going into lewd company, it is lawful for the husband to lay such a wife under restraint.

¹⁰ *In re Cochrane* (1840) 8 Dowl. 631.

¹¹ *Reg. v. Jackson* (1891) 1 Q. B. Div. 671.

¹² *Richards v. Richards*, 1 Grant (Pa.) 389.

¹³ *Gorman v. State*, 42 Tex. 221.

terfering with his parental authority.¹⁴ Perhaps, as it would be only reasonable, he would be permitted to prevent her from committing a tort for which he, as husband, would be civilly liable.¹⁵ A man, it was said by the Pennsylvania court, has a right to a reasonable control of his wife's actions. "It is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose."¹⁶

Chastisement.

According to Blackstone, and some of the early cases, the husband formerly had the right to give his wife moderate correction.¹⁷ No such right, however, is recognized to-day. Chastisement is unlawful in any case, and will render the husband guilty of assault and battery.¹⁸ Further than this, if sufficiently severe, or often repeated, under the statutes, it may entitle the wife to a divorce on the ground of cruelty.¹⁹ As was said by Chancellor Walworth in a New York case, "Whatever may be the common law on the sub-

¹⁴ 1 Bish. Mar., Div. & Sep. § 1624; Schouler, Dom. Rel. § 45. "In this country," says Dr. Bishop, "where we reject the suit for the restitution of conjugal rights, repudiating, therefore, by implication, the principle of a compelled cohabitation, whereon it is founded, there is apparently no just ground for permitting a husband to confine, even in his own house, a sane wife, who is simply unwilling to dwell with him. It is believed that none of our courts will recognize this authority. Still the husband must, with us, be permitted to exercise some restraint; for our law makes him criminally responsible for her acts of crime committed in his presence, and civilly for her torts, whether he is present or absent. And it would be absurd to deny him all means of avoiding these heavy liabilities. He must have the right to the physical control over her necessary to free himself." 1 Mar., Div. & Sep. § 1624.

¹⁵ 1 Bish. Mar., Div. & Sep. § 1624.

¹⁶ Richards v. Richards, *supra*.

¹⁷ 1 Bl. Comm. 445. "The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, but not in a violent or cruel manner." Bac. Abr. tit. "Baron and Feme," B. See State v. Rhodes, 1 Phil. (N. C.) 453.

¹⁸ 1 Bish. Mar., Div. & Sep. § 1617; Schouler, Dom. Rel. § 44; Com. v. McAfee, 108 Mass. 458; Pearman v. Pearman, 1 Swab. & T. 601; Perry v. Perry, 2 Paige (N. Y.) 501; Reg. v. Jackson (1891) 1 Q. B. Div. 671; Abbott v. Abbott, 67 Me. 304; Com. v. Barry, 2 Green, Cr. Rep. 286, note; People v. Winters, 2 Parker, Cr. R. (N. Y.) 10; Poor v. Poor, 8 N. H. 307.

¹⁹ Post, p. 174.

ject, the moral sense of this community, in our present state of civilization, will not permit the husband to inflict personal chastisement on his wife, even for the grossest outrage.”²⁰

RIGHT TO DETERMINE FAMILY DOMICILE.

34. The husband has a right to fix or to change the family domicile, and refusal of his wife to follow him, without sufficient excuse, will amount to desertion.

The general rule is that on marriage the domicile of the wife merges in that of her husband, and changes with his during the coverture.²¹ He has the power to establish the family domicile, and it is the duty of the wife to follow him, and her refusal to do so without sufficient excuse amounts to desertion.²² Even a promise before marriage not to take her away from the neighborhood of her mother and friends is not binding, and does not justify her refusal to accompany him to a new domicile.²³

While the cases generally state the rule to be that the husband has the absolute right to establish the domicile in any part of the world, yet the right is undoubtedly not an arbitrary one, but one that must be exercised with discretion, according to the exigencies and conditions of the case.²⁴ Thus it was said in a Vermont case:²⁵ “While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of abode of the family, and that it is in general the duty of the wife to submit

²⁰ *Perry v. Perry*, supra.

²¹ *Dolphin v. Robins*, 7 H. L. Cas. 390; *Greene v. Greene*, 11 Pick. (Mass.) 410; *Pennsylvania v. Ravenel*, 21 How. 103; *Davis v. Davis*, 30 Ill. 180; *Hackettstown Bank v. Mitchell*, 28 N. J. Law, 516.

²² *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163; *Hunt v. Hunt*, 29 N. J. Eq. 96; *Kennedy v. Kennedy*, 87 Ill. 250; *Walker v. Loughton*, 11 Fost. (N. H.) 111.

²³ *Jac. Dom.* §§ 215, 216; *Schouler, Dom. Rel.* §§ 37, 38; *Franklin v. Franklin*, 154 Mass. 515, 28 N. E. 681.

²⁴ 1 Bish. Mar., Div. & Sep. §§ 1713, 1714; *Gleason v. Gleason*, 4 Wis. 64; *Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Boyce v. Boyce*, 23 N. J. Eq. 337; *Bishop v. Bishop*, 30 Pa. St. 412; *Molony v. Molony*, 2 Addams, Ecc. 240; *Keech v. Keech*, 38 Law J. Prob. & Mat. 7; *Powell v. Powell*, 29 Vt. 148; *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153.

²⁵ *Powell v. Powell*, supra.

to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere willfulness."

An exception to the general rule that the domicile of the wife follows that of the husband is in cases where the husband and wife are in different states, and the wife sues for a divorce. The wife is allowed to acquire in the state where she is living at the time of the occurrence of a legal and adequate cause of divorce a distinct domicile from that of her husband, for the purpose of obtaining the divorce. When she has been abandoned by her husband, and denied the privilege of dwelling with him and going to him, the presumed identity of domicile becomes a fiction, founded on no adequate reason, and no longer prevails.

CRIMES OF MARRIED WOMEN.

35. A married woman is responsible, as if sole, for crimes voluntarily committed by her. If she commits an offense in the presence of her husband, or, though not in his immediate presence, near enough to be under his immediate influence and control, she is presumed to have acted, not voluntarily, but under his coercion; and he is responsible, while she is excused. This presumption may always be rebutted by showing that there was no coercion.
36. There is no reason, on principle, why the rule should not apply to all crimes; but in some jurisdictions it is held that it does not apply to treason, murder, or robbery.

As a general rule, a married woman is answerable personally for her crimes, as if she were sole. Where, however, she commits

an offense in the presence of her husband, she is presumed to have acted under his coercion, and he must suffer therefor, while she is excused on the ground of compulsion. An early case on this point, decided A. D. 1352, was a case in which a woman was indicted for larceny. The jury found "that she did it by coercion of her husband, in spite of herself," and she was acquitted.²⁶ The fact that the wife was active in committing the crime, or even more active than her husband, does not necessarily render her guilty, though this fact, of course, may tend to rebut the presumption of coercion; for her guilt depends, not upon the fact of her activity, but upon whether that activity was voluntary, or caused by her husband's coercion.²⁷ The rule, according to the weight of authority, does not apply to treason or murder. "As to murder, if husband and wife both join in it, they are both equally guilty."²⁸ It has, however, been applied even in the case of murder; and, on principle, there is no reason why it should not be.²⁹ It applies to assault with intent to kill,³⁰ to burglary,³¹ and, by the weight of opinion, to robbery.³²

This presumption does not arise from the mere command of her husband. She must have been in his presence, or so near that he could have exerted an immediate influence and control over her. There is no "legal presumption that acts done by a wife in her husband's absence are done under his coercion or control. Indeed if she, in his absence, do a criminal act, even by his order or pro-

²⁶ Anon., Lib. Ass. 137, pl. 40. And see Clark, Cr. Law, 77; Clark, Cr. Cas. 141; Anon., Kelyng, 31; Reg. v. Dykes, 15 Cox, Cr. Cas. 771; Rex v. Price, 8 Car. & P. 19; Com. v. Neal, 10 Mass. 152; Davis v. State, 15 Ohio, 72; State v. Houston, 29 S. C. 108, 6 S. E. 943; Com. v. Daley, 148 Mass. 11, 18 N. E. 579; State v. Kelly, 74 Iowa, 589, 38 N. W. 503; State v. Bell, 29 Iowa, 316; Roberts v. People, 19 Mich. 401; Mulvey v. State, 43 Ala. 316; State v. Baker, 110 Mo. 7, 19 S. W. 222.

²⁷ State v. Houston, 29 S. C. 108, 6 S. E. 943.

²⁸ Anon., Kelyng, 31. And see Davis v. State, 15 Ohio, 72; Bibb v. State, 94 Ala. 31, 10 South. 506. See dictum in Com. v. Neal, 10 Mass. 152.

²⁹ State v. Kelly, 74 Iowa, 589, 38 N. W. 503.

³⁰ Roberts v. People, 19 Mich. 401.

³¹ Anon., Kelyng, 31; State v. Bell, 29 Iowa, 316.

³² Reg. v. Dykes, 15 Cox, Cr. Cas. 771; People v. Wright, 38 Mich. 744; Miller v. State, 25 Wis. 384; Com. v. Daley, 148 Mass. 11, 18 N. E. 579; Davis v. State, 15 Ohio, 72. Contra, Bibb v. State, 94 Ala. 31, 10 South. 506.

curement, her coverture will be no defense.”³³ She need not, however, have been in his immediate presence, but it is sufficient if she was near enough to be under his influence and control. It was so held where a woman was indicted for an unlawful sale of intoxicating liquors, and it appeared that when she made the sale her husband was not in the room with her, but was on the premises.³⁴ In order to establish the fact of the husband’s presence, it is not necessary to show that the act was done literally in his sight. If he was near enough for the wife to be under his immediate influence and control, it is sufficient, though he may not have been in the same room; for if he was on the premises, and near at hand, a momentary absence from the room, or a momentary turning of his back, might still leave her under his influence.³⁵ “No exact rule, applicable to all cases, can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases; and where the wife did not act in the direct presence of her husband, or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will, independently of any coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist.”³⁶

From what has been said, it will be seen that the presumption of coercion is not conclusive, even where the wife acted in the immediate presence of her husband; but it may always be rebutted by showing to the satisfaction of the jury that she acted of her own free will, and not under coercion.³⁷

³³ *Com. v. Butler*, 1 Allen (Mass.) 4; *Com. v. Feeney*, 13 Allen (Mass.) 560; *State v. Potter*, 42 Vt. 495; *Com. v. Munsey*, 112 Mass. 287; *State v. Shee*, 13 R. I. 535; *Rex v. Morris*, Russ. & R. 270; *Seiler v. People*, 77 N. Y. 411.

³⁴ *Com. v. Burk*, 11 Gray (Mass.) 437; *Com. v. Munsey*, 112 Mass. 287.

³⁵ *Com. v. Munsey*, *supra*.

³⁶ *Com. v. Daley*, 148 Mass. 11, 18 N. E. 579.

³⁷ *Reg. v. Cruse*, 8 Car. & P. 553; *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855; *People v. Wright*, 38 Mich. 744; *Miller v. State*, 25 Wis. 384; *State v. Cleaves*, 59 Me. 298; *Reg. v. Torpey*, 12 Cox, Cr. Cas. 45; *Wagener v. Bill*, 19

In some states the common-law rule exempting a married woman from criminal liability for acts done in the presence of her husband, in the absence of a showing that she acted without coercion, has been changed by statute. In Georgia, for instance, by statute, a wife is not excused by the mere presence of her husband; but it must be made to appear, in order to excuse her, that "violent threats, command, or coercion were used" by him.³⁸

CRIMES AS BETWEEN HUSBAND AND WIFE.

37. Generally, husband and wife are criminally liable for criminal acts committed against each other. Because of the relation, however, at common law

- (a) Neither can commit larceny, burglary, or arson against the other; nor is one who assists the wife guilty of larceny.

EXCEPTION—This does not apply where the wife is an adulteress, or elopes for the purpose of adultery, and steals her husband's property.

- (b) The husband cannot commit a rape upon his wife, except:

EXCEPTION—As principal in the second degree, or as accessory, by abetting or assisting another to ravish her.

The principle that, in the eye of the law, husband and wife are one person, prevents certain acts by the one or the other of them from being a crime, though it would be otherwise were the same act committed against a stranger. It is well settled, for instance, that at common law neither a husband nor a wife can commit larceny from the other.³⁹ And so far is this doctrine carried that

Barb. (N. Y.) 321; Com. v. Eagan, 103 Mass. 71; U. S. v. Terry, 42 Fed. 317. As by showing that the husband was crippled, and incapable of coercion. Reg. v. Cruse, *supra*.

³⁸ Bell v. State, 92 Ga. 49, 18 S. E. 186.

³⁹ Clark, Cr. Law, 247; Reg. v. Kenny, 13 Cox, Cr. Cas. 397, 2 Q. B. Div. 307; Reg. v. Tollett, Car. & M. 112; Thomas v. Thomas, 51 Ill. 162; Snyder v. People, 26 Mich. 106; Com. v. Hartnett, 3 Gray (Mass.) 450; Overton v.

a third person who assists a wife in taking her husband's property is not guilty of larceny.⁴⁰ An exception to this rule is made in cases where a wife becomes an adulteress. If she then takes her husband's property, *animo furandi*, she commits larceny; and so does her paramour, if he assists her in taking it.⁴¹ "The general rule of law is that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases."⁴²

On the same principle of unity of husband and wife, with the consequent right of each to the joint possession and use of the other's property, neither husband nor wife can commit burglary or arson, as against the other's dwelling house.⁴³

A husband has a legal right to sexual intercourse with his wife, and therefore he cannot be guilty of rape, in having intercourse with her forcibly and against her will.⁴⁴ He may, however, be guilty as a principal in the second degree, or as accessory, according to the circumstances, if he aids or abets another in a rape upon her.⁴⁵

State, 43 Tex. 616; *State v. Banks*, 48 Ind. 197; *Lamphier v. State*, 70 Ind. 317.

⁴⁰ Clark, Cr. Law, 247; *Reg. v. Tollett*, *supra*; cases in the following note.

⁴¹ *Reg. v. Avery*, 8 Cox, Cr. Cas. 184; *Reg. v. Thompson*, 2 Craw. & D. 491; *Rex v. Clark*, 1 Moody, Cr. Cas. 376, note; *Reg. v. Featherstone*, 6 Cox, Cr. Cas. 376; *Rex v. Tolfree*, 1 Moody, Cr. Cas. 243; *Reg. v. Tollett*, Car. & M. 112; *State v. Banks*, 48 Ind. 197, 198; *People v. Schuyler*, 6 Cow. (N. Y.) 572; Clark, Cr. Law, 247, 248. This, it has been said, does not apply where the wife merely carries away her necessary apparel. *State v. Banks*, *supra*. But see *Reg. v. Tollett*, *supra*.

⁴² *State v. Banks*, *supra*.

⁴³ *Snyder v. People*, 26 Mich. 106; *Rex v. March*, 1 Moody, Cr. Cas. 182; *State v. Toole*, 29 Conn. 342; *Adams v. State*, 62 Ala. 177; Clark, Cr. Law, 229; Clark, Cr. Cas. 307. *Contra*, under modern statutes. *Garrett v. State*, 109 Ind. 527, 10 N. E. 570. But see cases cited above, in which it is shown that the married women's acts are not to be construed as changing the common law.

⁴⁴ Clark, Cr. Law, 190.

⁴⁵ *Strang v. People*, 24 Mich. 13; *People v. Chapman*, 62 Mich. 280, 28 N. W. 896; *State v. Dowell*, 106 N. C. 722, 11 S. E. 525.

With the exceptions above stated, husband and wife are generally liable to the criminal law for criminal acts committed against each other. If either kills the other, he or she is liable for the homicide. So either of them is criminally liable for an assault and battery on the other.⁴⁶

TORTS OF MARRIED WOMEN.

38. At common law a husband, during coverture, is liable for the torts committed by his wife, either before or during coverture. This liability ceases, however, when the coverture is determined by the death of either party, or by a divorce.
39. The rules governing a wife's liability for her own torts are these:
- (a) She is liable, jointly with her husband during coverture, and solely after his death or a divorce,
 - (1) For torts committed in his absence, whether committed by his direction or command, or not.
 - (2) For torts committed in his presence, but not by his direction or command, express or implied.
 - (b) She is not liable at all for torts committed in his presence, and by his direction or command, but is excused on the ground of coercion.
 - (c) Torts committed by a wife in her husband's actual or constructive presence are presumed to have been committed by his direction or command; but this presumption is *prima facie* only, and may be rebutted.
40. Where a married woman's tort is so connected with an attempted contract by her that to hold her liable therefor would be to recognize the contract, neither she nor her husband is liable at common law.

⁴⁶ Clark, Cr. Law, 212, 213; *Com. v. McAfee*, 108 Mass. 458; *State v. Oliver*, 70 N. C. 60; *Reg. v. Jackson* [1891] 1 Q. B. Div. 671; ante, p. 52.

41. These rules of the common law have been greatly modified by modern statutes, in most jurisdictions, removing the disabilities of married women, and by those taking from the husband the rights which the common law gave him in respect to his wife's property. Thus—
- (a) In some states a husband is no longer liable for the torts of his wife, unless he participated in their commission.
 - (b) In other states he is liable for her personal torts, like slander or assault, but not for torts committed in the control of her separate property.
 - (c) Where married women have by statute been given the power to contract, they may be liable for torts in connection with their contracts.

Common-Law Doctrine.

At common law a husband is liable for the frauds and other torts of his wife, whether they were committed by her before marriage,⁴⁷ or during coverture.⁴⁸ One of the reasons for this doctrine was that the unity of husband and wife rendered the wife incapable of being sued alone. Her husband had to be joined in all actions against her.⁴⁹ Another reason was that the husband became the absolute owner of his wife's personal property, and had the right to receive her earnings and the rents and profits of her real estate,

⁴⁷ Macq. *Husb. & W.* 72; Schouler, *Husb. & W.* § 134; *Palmer v. Wakefield*, 3 Beav. 227; *Hawk v. Harman*, 5 Bin. (Pa.) 43; *Hubble v. Fogartie*, 3 Rich. Law (S. C.) 413; *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212; *Kowing v. Manly*, 49 N. Y. 192.

⁴⁸ 2 Kent, *Comm.* 149; *Kowing v. Manly*, *supra*; *Head v. Briscoe*, 5 Car. & P. 484; *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907; *Jag. Torts*, 216-223; *Baker v. Young*, 44 Ill. 42; *Fowler v. Chichester*, 26 Ohio St. 9; *Wright v. Kerr*, Addison (Pa.) 13; *Vine v. Saunders*, 5 Scott, 359; *Ball v. Bennett*, 21 Ind. 427; *Hinds v. Jones*, 48 Me. 348; *Dailey v. Houston*, 58 Mo. 361; *Carleton v. Haywood*, 49 N. H. 314; *Jackson v. Kirby*, 37 Vt. 448; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Holtz v. Dick*, 42 Ohio St. 23; *Heckle v. Lurvey*, 101 Mass. 344.

⁴⁹ *Jag. Torts*, 217; *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039.

so that it was only just to hold him liable for her torts.⁵⁰ Another consideration was that he should not permit her to commit torts.⁵¹ The liability, however, was not based on any idea that he was himself guilty of her torts, even in contemplation of law.⁵² The liability exists even where the husband is separated from his wife, so long as the marriage has not been dissolved.⁵³

Where a wife acts in the absence of her husband, either by or without his command,⁵⁴ or where she acts in his presence, but of her own volition, and without any coercion by him,⁵⁵ she also is liable; and they not only may, but must, be sued jointly. At common law this liability is joint, and renders it necessary to sue the husband and wife jointly. It is not enough to sue either the wife or the husband alone.⁵⁶ Where, however, a tort is committed by a wife in the presence of her husband, and by his command or coercion, she is not liable at all. He only is liable, and must be sued alone.⁵⁷ To thus exempt a married woman from liability for her

⁵⁰ *Martin v. Robson*, 65 Ill. 129.

⁵¹ *Martin v. Robson*, 65 Ill. 129.

⁵² *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039.

⁵³ *Head v. Briscoe*, 5 Car. & P. 485; *Ferguson v. Neilson*, 17 R. I. 81, 20 Atl. 229.

⁵⁴ *Cassin v. Delany*, 38 N. Y. 178; *Head v. Briscoe*, 5 Car. & P. 484; *Catterall v. Kenyon*, 3 Q. B. 310; *Whitmore v. Delano*, 6 N. H. 543; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90; *Handy v. Foley*, 121 Mass. 259; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Wheeler & Wilson Manuf'g Co. v. Heil*, 115 Pa. St. 487, 8 Atl. 616; *Smith v. Taylor*, 11 Ga. 22; *Marshall v. Oakes*, 51 Me. 308; *Heckle v. Lurvey*, 101 Mass. 344.

⁵⁵ *Hyde v. S.*, 12 Mod. 246; *Vine v. Saunders*, 5 Scott, 359; *Roadcap v. Sipe*, 6 Grat. (Va.) 213; *Cassin v. Delany*, 38 N. Y. 178; *Marshall v. Oakes*, 51 Me. 308; *Carleton v. Haywood*, 49 N. H. 314; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Simmons v. Brown*, 5 R. I. 299; *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851.

⁵⁶ *Eversley*, Dom. Rel. 295; *Mitchinson v. Hewson*, 7 Term R. 348; *Marshall v. Oakes*, 51 Me. 308. "For any wrong committed by her, she is liable, and her husband cannot be sued without her. Neither can she be sued without her husband." Per Erle, C. J., in *Capel v. Powell*, 34 Law J. C. P. 168, 17 C. B. (N. S.) 743. And see the cases in the two preceding notes.

⁵⁷ *Cassin v. Delany*, 38 N. Y. 178; *Kosminsky v. Goldberg*, 44 Ark. 401; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *McKeown v. Johnson*, 1 McCord (S. C.) 578; *Ball v. Bennett*, 21 Ind. 427; *Doherty v. Madgett*, 58 Vt. 323, 2 Atl.

tortious acts, two things must concur: She must have been in her husband's presence, actually or constructively; and she must have acted by his express or implied command. An act by his command, but not in his presence, renders her liable. And so it is if she does an act in his presence, but of her own volition, and not by his command.⁵⁸

If it is shown that the tort was committed by the wife in her husband's presence, and nothing further appears, the presumption of law is that she acted under coercion by him, so as not to be liable herself.⁵⁹ But the presumption is *prima facie* only, and may always be rebutted, so as to render her liable by showing that she acted of her own free will, and not by her husband's direction; and, of course, this may, and generally must, be shown by the circumstances surrounding the commission of the act.⁶⁰ "His presence furnishes evidence and affords a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence."⁶¹

In order that an act may be said to have been committed by the wife in her husband's presence, it is not necessary that it shall have

115; *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907; *Dailey v. Houston*, 58 Mo. 361.

⁵⁸ "The authorities are clear that, when a tort or felony of any inferior degree is committed by the wife in the presence and by the direction of her husband, she is not personally liable. To exempt her from liability, both of these concurrent circumstances must exist, to wit, the presence and the command of the husband. An offense by his direction, but not in his presence, does not exempt her from liability; nor does his presence, if unaccompanied by his direction." *Cassin v. Delany*, 38 N. Y. 178.

⁵⁹ *Cooley*, Torts, 115; *Kosminsky v. Goldberg*, 44 Ark. 401; *Marshall v. Oakes*, 51 Me. 308; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Carleton v. Haywood*, 49 N. H. 314; *Seller v. People*, 77 N. Y. 411; *Hildreth v. Camp*, 41 N. J. Law, 306.

⁶⁰ *Marshall v. Oakes*, 51 Me. 308; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Roadcap v. Sipe*, 6 Grat. (Va.) 213; *Simmons v. Brown*, 5 R. I. 299; *Griffin v. Reynolds*, 17 How. 609; *Marshall v. Oakes*, 51 Me. 308; *Carleton v. Haywood*, 49 N. H. 314; *Handy v. Foley*, 121 Mass. 258; *Miller v. Sweitzer*, 22 Mich. 391; *Cassin v. Delany*, 38 N. Y. 178; *Heckle v. Lurvey*, 101 Mass. 344; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Fowler v. Chichester*, 26 Ohio St. 9; *Estill v. Fort*, 2 Dana (Ky.) 237; *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851.

⁶¹ *Cassin v. Delany*, *supra*.

been done in his sight. It is sufficient if she was near enough to be under his immediate influence and control. No exact rule, applicable to all cases, can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of each case.⁶² The question has already been considered, in treating of the crimes of married women.⁶³

The liability of a husband for his wife's torts, not in any way participated in by him, whether committed before or after marriage, is not based on any idea that the husband is a tortfeasor; but one of the chief reasons of it is because the wife cannot, at common law, be sued alone. It follows, in so far as this reason is concerned, that the husband's liability continues only during coverture. And it is held that if not reduced to judgment before her death, or a divorce, the cause of action ceases, as against him.⁶⁴ On his death she is solely liable, and, as there is nothing to prevent her being sued alone, the cause of action survives against her.⁶⁵ Of course, if it is shown that the husband actually commanded his wife to commit the tort, or otherwise actually participated in its commission, he is liable as an actual tortfeasor, and not merely because he is her husband.⁶⁶ It follows that he could be sued therefor after her death; the action being for his own tort, and not for hers. Further than this, if a husband authorizes his wife to act for him as agent, he will be liable for her acts as agent.⁶⁷

Torts Connected with Contracts.

At common law, since a married woman was incapable of binding herself by contract, she could not be held liable for a tort when this would have the effect of indirectly making her liable on contract.

⁶² Com. v. Munsey, 112 Mass. 287.

⁶³ Ante, p. 54, and cases there cited.

⁶⁴ Cooley, Torts, 115; Jag. Torts, 217; Wright v. Leonard, 11 C. B. (N. S.) 258, 266; Reeve, Dom. Rel. 100; Phillips v. Richardson, 4 J. J. Marsh. (Ky.) 212; Ferguson v. Collins, 8 Ark. 241; Capel v. Powell, 17 C. B. (N. S.) 743; Kowing v. Manly, 49 N. Y. 192. But see McKeown v. Johnson, 1 McCord (S. C.) 578; Cassin v. Delany, 38 N. Y. 178.

⁶⁵ Rigley v. Lee, Cro. Jac. 356; Baker v. Braslin, 16 R. I. 635, 18 Atl. 1039; Appeal of Franklin's Adm'r, 115 Pa. St. 534, 6 Atl. 70.

⁶⁶ See Handy v. Foley, 121 Mass. 258; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907.

⁶⁷ Taylor v. Green, 8 Car. & P. 316.

For instance, it has been held that an action cannot be maintained at common law against a husband and wife for her false and fraudulent representation that she was a widow at the time she executed a bond and mortgage.⁶⁸ In *Fairhurst v. Liverpool Adelphi Association*,⁶⁹ where it was held that a husband and wife could not be sued in tort for a false and fraudulent representation by the wife that she was sole at the time of signing a note, Pollock, C. B., said: "A feme covert is unquestionably incapable of binding herself by a contract. It is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be held responsible, and the husband be sued for it together with the wife."⁷⁰ On the same principle it has been held that a married woman, even though living apart from her husband, and maintaining a separate establishment with her own means, is not liable for the tort of a servant hired by her; for, as she is incapable of contracting, she cannot occupy the position of a master or principal, and the rule respondeat superior therefore cannot apply.⁷¹ "The general principle that, for the torts or frauds of the wife, an action may be sus-

⁶⁸ *Keen v. Coleman*, 39 Pa. St. 299.

⁶⁹ 9 Exch. 422, 23 Law J. Exch. 163.

⁷⁰ And see *Wright v. Leonard*, 11 C. B. (N. S.) 258; *Cooper v. Witham*, 1 Lev. 247; *Woodward v. Barnes*, 46 Vt. 332; *Trust Co. v. Sedgwick*, 97 U. S. 304; *Kowing v. Manly*, 49 N. Y. 192; *Ferguson v. Neilson*, 17 R. I. 81, 20 Atl. 229; *Keen v. Hartman*, 48 Pa. St. 497; *Owens v. Snodgrass*, 6 Dana (Ky.) 229; *Curd v. Dodds*, 6 Bush (Ky.) 681. For the same principle as applied to infants, see *Jennings v. Rundall*, 8 Term R. 335; *Clark*, Cont. 260; post, p. 408.

⁷¹ *Ferguson v. Neilson*, supra. But see *Schmidt v. Keehn*, 57 Hun, 585, 10 N. Y. Supp. 267, where a married woman was held liable for the negligence of her agent in making improvements on her separate property, and *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, where a distinction is drawn between the terms "agent" and "servant," and it is said that, though a married woman may not have an agent, in regard to her fee-simple property, she may have a servant, and be liable for his acts in relation to the property.

tained against her and her husband, applies only to torts simpliciter, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife."⁷²

This rule has been rendered inapplicable to some extent by the statutes giving married women a power to contract.⁷³

Effect of Modern Statutes.

The common-law disabilities of a married woman, and the liability of her husband for her torts, remain at this time, both in England and in this country, except in so far as they have been modified by statute. Modern statutes have been enacted, both in England and in this country, removing, to a greater or less extent, the disabilities of married women; taking away from the husband rights which he had at common law, and either expressly or by implication relieving him from liabilities imposed upon him by the common law by reason of the marriage. Even if these statutes do not expressly refer to the husband's liability for the torts of his wife, it is very obvious that they must modify it to some extent. If the liability is based on the right of the husband to control the conduct of his wife, then to take away this right would seem clearly to take away the liability, on the principle, "Cessante ratione, cessat ipsa lex." If the liability is based on the fact that the wife cannot be sued without joining her husband, it would seem to cease when, by statute, a married woman is allowed to sue and be sued as a *feme sole*. If the liability is based on the husband's rights in the property of his wife, then the liability ought not to exist when these rights are taken away from him. This is only reasonable and just.⁷⁴

The statutes commonly known as the "Married Women's Acts" vary so much in the different states, and the judges have differed so widely in their opinions as to their effect, that no universal statement as to a husband's liability for his wife's torts can be made. The reader must consult the statutes and decisions of his state. In many of the states the courts have been very conservative—perhaps too much so—in adopting innovations in the common-law doctrine. They require that the intention of the legislature to make such changes must be clearly and unambiguously expressed.

⁷² Woodward v. Barnes, 46 Vt. 332.

⁷³ See Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870.

⁷⁴ Martin v. Robson, 65 Ill. 129.

Even where, by statute, a wife's separate estate is liable for her torts, it has been held that her husband's joint liability for her personal torts still remains. In New York and a number of other states, for instance, a husband is still liable as at common law for slanderous words spoken by his wife, though spoken in his absence, and though he in no manner participated therein; and the same is true of assault and battery, or any other personal tort.⁷⁵ The decision in all of these cases proceeds upon the ground that statutes changing the common law are to be strictly construed, and the latter will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires, and hence that the common-law disabilities and liabilities incident to the relation of husband and wife still exist, except in so far as they have been swept away by express enactments.

In other states it is held that the statutes removing the disabilities of a married woman to sue and to be sued, and taking from the husband his common-law rights in her property, and to her earnings, impliedly remove his common-law liability for her torts committed in his absence and without his participation, even though the tort has no connection with the management and control of her separate property. It is held, for instance, that he is not liable for slanderous words spoken by her in his absence, and without his participation.⁷⁶ In Illinois the statutes give a married woman the sole control of her separate property and estate acquired in good faith from any person other than her husband, and the right to her own earnings; and it has been held in that state that the effect of these statutes is to remove the husband's liability for the torts of his wife, if he is not present when they are committed, and in no manner participates in them. The court said that so long as the husband was entitled to the property of the wife and to her in-

⁷⁵ *Kowing v. Manley*, 57 Barb. (N. Y.) 479; *Baum v. Mullen*, 47 N. Y. 577; *Mangam v. Peck*, 111 N. Y. 401, 18 N. E. 617; *Fitzgerald v. Quann*, 33 Hun, 652; *Id.*, 109 N. Y. 441, 17 N. E. 354; *Choen v. Porter*, 66 Ind. 195; *Fowler v. Chichester*, 26 Ohio St. 9; *Ferguson v. Brooks*, 67 Me. 251; *McQueen v. Fulgham*, 27 Tex. 463; *Luse v. Oaks*, 36 Iowa, 562; *McElfresh v. Kirkendall*, *Id.* 224; *Quick v. Miller*, 103 Pa. St. 67.

⁷⁶ Cases hereafter cited.

dustry, so long as he had the power to direct and control her, and thus prevent her from the commission of torts, there was some reason for the rule, but, as the reason had been removed, so also should the rule. "A liability," it was said, "which has for its consideration rights conferred, should no longer exist, when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved."⁷⁷ To the same effect are the decisions in some of the other states. These decisions all proceed on the principle of the common law, "*Cessante ratione, cessat ipsa lex.*"⁷⁸

Even in those states where, as in New York, a husband is still held liable as at common law for the personal torts of his wife, like slander, assault and battery, etc., it is very generally held that his liability is limited to torts of this character, and does not extend to torts committed by his wife in the management and control of her separate property, as where she permits a nuisance on her land,⁷⁹ suffers her cattle to stray on her neighbor's land,⁸⁰ commits a fraud in the sale of her separate property,⁸¹ or is guilty of any other tortious act or omission in relation to her separate property.⁸² If the wife is by statute capable of managing and controlling her separate property, so as to be thus liable for her torts committed in relation thereto, she may be liable for the torts of her husband in

⁷⁷ *Martin v. Robson*, 65 Ill. 129.

⁷⁸ *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862; *Berger v. Jacobs*, 21 Mich. 215; *Burt v. McBain*, 29 Mich. 260; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. 23; *Musselman v. Galligher*, 32 Iowa, 383; *Pancoast v. Burnell*, Id. 394; *Mewhirter v. Hatten*, 42 Iowa, 288; *Kuklence v. Vocht* (Pa. Sup.) 13 Atl. 198; *Vocht v. Kuklence*, 119 Pa. St. 365, 13 Atl. 199.

⁷⁹ *Fiske v. Bailey*, 51 N. Y. 150; *Quilty v. Battie*, 135 N. Y. 201, 32 N. E. 47.

⁸⁰ *Rowe v. Smith*, 45 N. Y. 230.

⁸¹ *Baum v. Mullen*, 47 N. Y. 577.

⁸² *Ferguson v. Brooks*, 67 Me. 251. Keeping on her premises a vicious dog. *Quilty v. Battie*, 135 N. Y. 201, 32 N. E. 47. Where she is guilty of a conversion, in seizing property on which she claims a lien, the husband not interfering in any way. *Peak v. Lemon*, 1 Lans. (N. Y.) 295. But see *Wheeler & Wilson Manuf'g Co. v. Hell*, 115 Pa. St. 487, 8 Atl. 616.

relation thereto, where he is acting as her agent under authority from her.⁸³

Of course, the husband is solely liable for torts committed by himself alone in relation to his wife's separate property, and if he participates with her in the commission of any tort he is liable as a joint tortfeasor. The fact, for instance, that the property on which a man lives with his wife belongs to her does not render her liable as a keeper and harbinger of his vicious dogs, but the liability is solely on him.⁸⁴

The statutes, as has already been remarked, vary greatly in the different states. In some states they are not nearly so broad as in others, and in many cases, therefore, apparently conflicting decisions may be reconciled. In some states it is expressly declared by statute that a husband shall not be liable for the torts of his wife unless he directed them, or otherwise participated therein.⁸⁵

The married women's acts do not change the rule stated on a preceding page, that a woman who commits a tort in the presence of her husband is presumed to have acted under his coercion, and is not liable therefor unless it is affirmatively shown that she did not act under coercion. *Prima facie* the husband is solely liable.⁸⁶

TORTS AS BETWEEN HUSBAND AND WIFE.

42. Neither spouse is liable to the other, either during coverture or after divorce, for wrongful acts committed during coverture.

43. The husband in such a case could sue third persons who assisted his wife, but the wife could not sue third persons who assisted her husband.

⁸³ *Ferguson v. Brooks*, 67 Me. 251; *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533.

⁸⁴ *Bundschuh v. Mayer*, 81 Hun, 111, 30 N. Y. Supp. 622. And see *Strouse v. Leipf*, 101 Ala. 433, 14 South. 667; *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18.

⁸⁵ *Story v. Downey*, 62 Vt. 243, 20 Atl. 321; *Kuklence v. Vocht* (Pa. Sup.) 13 Atl. 198; *Vocht v. Kuklence*, 119 Pa. St. 365, 13 Atl. 199; *Strouse v. Leipf*, 101 Ala. 433, 14 South. 669; *Austin v. Cox*, 118 Mass. 58.

⁸⁶ *Ante*, p. 61.

Since the unity of husband and wife at common law rendered it impossible for the wife to sue the husband, it necessarily followed that she could not sue him for a tort committed against her; as, for instance, for slander, or for an assault and battery.⁸⁷ He was amenable, if at all, to the criminal law only. No cause of action arose at all in favor of the wife, and it followed that she could not, even after a divorce, sue him for a tort committed during coverture. In a Maine case⁸⁸ it was sought to sustain an action by a wife against her husband, after a divorce, for an assault committed upon her during coverture, on the ground that coverture merely suspends the right of action, and does not destroy it, but it was held that this contention was unsound. "The error in the proposition," said the court, "is the supposition that a cause of action, or a right of action, ever exists in such a case. There is not only no civil remedy, but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife, and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any."⁸⁹

Nor can a woman, either before or after divorce, maintain an action against persons who assisted her husband to commit a tort against her, like assault and battery, for instance, during coverture. Such an action could only be maintained, if at all, during coverture, in the name of both the husband and wife; and, as he could not maintain it, no cause of action arises in her favor.⁹⁰

The same principle will prevent an action by a husband, either during coverture or after divorce, against his wife, for her wrongful acts during coverture. It would not, however, prevent the hus-

⁸⁷ 1 Jag. Torts, 463; *Abbott v. Abbott*, 67 Me. 304; *Phillips v. Barnet*, 1 Q. B. Div. 436; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641; *Longendyke v. Longendyke*, 44 Barb. (N. Y.) 366; *Peters v. Peters*, 42 Iowa, 182; *Main v. Main*, 46 Ill. App. 106; *Libby v. Berry*, 74 Me. 286; *Nickerson v. Nickerson*, 65 Tex. 281; *Schultz v. Schultz*, 89 N. Y. 644; *Kujek v. Goldman*, 9 Misc. Rep. 34, 29 N. Y. Supp. 204.

⁸⁸ *Abbott v. Abbott*, 67 Me. 304.

⁸⁹ And see *Phillips v. Barnet*, *supra*.

⁹⁰ *Abbott v. Abbott*, 67 Me. 304.

band from suing third persons who assisted the wife, and he could bring such an action during coverture as well as after a divorce.

In a few states the common-law rule has been changed by statute so that a wife may maintain an action against her husband for a tort, but to authorize such an action the statute must be clear. Statutes giving a married woman the power to acquire, hold, and dispose of property free from the control of her husband have been construed as giving a married woman a right of action for torts committed by her husband upon her separate property, as trespass or conversion.⁹¹ In some of the cases, however, the courts have denied this construction. It was said by the Pennsylvania court, in reference to a separate property act: "As the only object of the act was to afford a protection to the estates of married women, we may assume that it was not intended that she should so fully own her separate property as to impair the intimacy of the marriage relation. It was not intended to declare that her property should be so separate that her husband could be guilty of larceny of it, or liable in trespass or trover for breaking a dish or a chair, or using it without her consent."⁹²

TORTS AGAINST MARRIED WOMEN.

44. When a tort is committed against a married woman, damages may be recovered

(a) For the injury to the wife,—as for her mental and physical suffering.

(1) At common law, in a joint action by husband and wife, and only in such an action.

(2) By statute, in most states, by the wife suing alone.

(3) At common law, such a cause of action abates on the death of the wife.

(b) For injuries to the husband,—as for the loss of the wife's society and services, and for his disburse-

⁹¹ *Mason v. Mason*, 66 Hun, 386, 21 N. Y. Supp. 306; *Ryerson v. Ryerson*, 55 Hun, 611, 8 N. Y. Supp. 738.

⁹² *Walker v. Reamy*, 36 Pa. St. 410.

ments,—in an action by the husband suing alone, at common law, and in such an action only. By statute in some states, such damages can be recovered in the joint action. This cause of action does not abate on the wife's death.

Injury to the Wife—Joint Action.

At common law, as will presently be explained more at length, marriage confers upon the husband an absolute right to all of his wife's personal property in possession, and to her choses in action if he reduces them to possession during coverture.⁹³ Claims of the wife for damages growing out of torts committed by third persons against her person or character, such as assault and battery, negligent personal injury, libel, slander, etc., are choses in action within this rule.⁹⁴ At common law an action for such injuries must be brought in the name of the husband and wife jointly; during coverture neither can sue alone.⁹⁵ The damages recovered in such an action are for the injury to the wife, and not for any injury to the husband; but they belong to the husband, when recovered.⁹⁶ For this reason it has been held that he may release or compromise the claim. If the husband dies pending the action, it does not abate, but may proceed to judgment in the name of the wife alone; and, if the husband dies before commencing an action, the wife may enforce the claim by an action in her own name.⁹⁷ On the death of the wife the cause of action ceases, and the husband therefore cannot afterwards commence an action in his own name, nor continue with an action which has already been commenced.⁹⁸

⁹³ Post, pp. 85, 88.

⁹⁴ *Anderson v. Anderson*, 11 Bush (Ky.) 327.

⁹⁵ *Cooley*, Torts, 227; *Dengate v. Gardiner*, 4 Mees. & W. 6; *Berger v. Jacobs*, 21 Mich. 215; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 441; *Laughlin v. Eaton*, 54 Me. 156; *Hooper v. Haskell*, 56 Me. 251; *Saltmarsh v. Candia*, 51 N. H. 71; *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161; *Rogers v. Smith*, 17 Ind. 323; *Smith v. City of St. Joseph*, 55 Mo. 456; *King v. Thompson*, 87 Pa. St. 365. Refusal of the husband to bring the action does not entitle the wife to sue alone. *Rice v. Railroad Co.*, 8 Tex. Civ. App. 130, 27 S. W. 921.

⁹⁶ *Dengate v. Gardiner*, supra; *Hyatt v. Adams*, 16 Mich. 180.

⁹⁷ *Newton v. Hatter*, 2 I.d. Raym. 1208; *Schouler*, Dom. Rel. § 77.

⁹⁸ *Bac. Abr.*, "Baron and Feme," k, 60; *Meese v. City of Fond du Lac*, 48

The recovery in the joint action is confined to damages for the injury to the wife, such as her mental and physical suffering; and damages to the husband, as the expenses of medical attendance, loss of wages, services, etc., in the case of personal injuries to the wife, must be recovered by the husband suing alone.⁹⁹

In most states the common-law rules with regard to actions for torts against married women have been modified by statute; and it is very generally provided that a married woman may sue alone for injuries to her person or character, and recover her damages for her own benefit.¹⁰⁰ In some states the statutes only allow her to sue in her own name in relation to her separate property. She can, under these statutes, sue for a trespass upon, or a conversion of, her separate property; but for injuries to her person or character she can only sue jointly, as at common law.¹⁰¹

Injury to Husband—Action by Husband Alone.

In addition to this joint action for torts committed against his wife, the husband may sue alone, "per quod consortium amisit," as it is expressed, for injuries to her which render her less able to perform services. In such an action he can recover his own damages, and such damages only,—as, in case of personal injuries, for the loss of her society and services, moneys necessarily expended by him for care and attendance, and other incidental expenses.¹⁰² He

Wis. 323, 4 N. W. 406; *Purple v. Railroad Co.*, 4 Duer (N. Y.) 74; *Hodgman v. Railroad Corp.*, 7 How. Prac. (N. Y.) 492; *Butler v. Railroad Co.*, 22 Barb. (N. Y.) 110; *Meech v. Stoner*, 19 N. Y. 26.

⁹⁹ *Meese v. City of Fond du Lac*, supra.

¹⁰⁰ *Stevenson v. Morris*, 37 Ohio St. 10; *Matthew v. Railroad Co.*, 63 Cal. 450; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *City of Bloomington v. Annett*, 16 Ill. App. 199; *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260; *Hennies v. Vogel*, 66 Ill. 401; *Pavlovski v. Thornton*, 89 Ga. 829, 15 S. E. 822; *Fife v. City of Oshkosh*, 89 Wis. 540, 62 N. W. 541; *City of Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62; *Barnett v. Leonard*, 66 Ind. 422. In some states the wife must sue alone under the statute. *Michigan Cent. R. Co. v. Coleman*, supra. *Story v. Downey*, 62 Vt. 243, 20 Atl. 321; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17. In others the statute does not prevent, but merely renders unnecessary, the joinder of the husband. *East Tennessee, V. & G. R. Co. v. Cox*, 57 Ga. 252.

¹⁰¹ *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

¹⁰² 3 Bl. Comm. 140; *Moore v. Bullock*, Cro. Jac. 501; *Cooley*, Torts, 226; 1 Jag. Torts, p. 469; note, 48 Am. Dec. 619; *Hyatt v. Adams*, 16 Mich. 180;

cannot, in such an action, recover for the mental or physical suffering of his wife.¹⁰³ Damages for injuries personal to the wife must be recovered in the joint action, and damages for injuries to the husband must be recovered in an action by the husband alone.¹⁰⁴ In some states this has been changed by statute, and all damages, whether to the wife or to the husband, may be recovered in a joint

Berger v. Jacobs, 21 Mich. 215; *Mewhirter v. Hatten*, 42 Iowa, 288; *Matteson v. Railroad Co.*, 35 N. Y. 487; *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Rogers v. Smith*, 17 Ind. 323; *Smith v. City of St. Joseph*, 55 Mo. 456; *King v. Thompson*, 87 Pa. St. 365; *Barnes v. Martin*, 15 Wis. 240. Thus an action may be maintained by the husband per quod consortium amisit, under this rule, for the following injuries, among others, against the wife: Assault and battery. *Berger v. Jacobs*, 21 Mich. 215. Sale to her of a drug like laudanum, opium, or morphine, which the seller knows she is in the habit of using to excess. *Hoard v. Peck*, 56 Barb. (N. Y.) 202. Malpractice by physician or surgeon. *Hyatt v. Adams*, 16 Mich. 180; *Mewhirter v. Hatten*, 42 Iowa, 288; *Mowry v. Chaney*, 43 Iowa, 609. Negligence resulting in personal injuries. *Matteson v. Railroad Co.*, 35 N. Y. 487; *Smith v. City of St. Joseph*, 55 Mo. 456; *Hopkins v. Railroad Co.*, 36 N. H. 9; *Fuller v. Railroad Co.*, 21 Conn. 556. Libel or slander of wife, where there is a loss of services or society to the husband, as where she is prevented from obtaining employment, the wages of which would go to the husband. *Dengate v. Gardiner*, 4 Mees. & W. 6. And see *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578. Malicious prosecution. *Rogers v. Smith*, 17 Ind. 323. Actions for enticing, harboring, and alienation of affection are considered in a separate section. See post, p. 74. So, also, with actions for seduction or criminal conversation. See post, p. 79. The husband's damages in these cases for loss of his wife's services are not to be measured as if she were a mere servant. "Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value." Per Agnew, J., in *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329. And see *Meese v. City of Fond du Lac*, 48 Wis. 323, 4 N. W. 406, where the wife was an invalid before the injury. As to measure of damages generally, see note, 48 Am. Dec. 620, 621.

¹⁰³ *Hooper v. Haskell*, 56 Me. 251; *Hyatt v. Adams*, 16 Mich. 180.

¹⁰⁴ See the cases cited above. And see, particularly, *Dengate v. Gardiner*, 4 Mees. & W. 6; *Fuller v. Naugatuck R. Co.*, 21 Conn. 556; *Barnes v. Martin*, 15 Wis. 240; *Kavanaugh v. City of Janesville*, 24 Wis. 618; *King v. Thompson*, 87 Pa. St. 365.

action.¹⁰⁵ The death of the wife either before or during an action by the husband for his damages for loss of services, expenses, etc., will not defeat the action.

In case of injuries resulting in his wife's death, the husband cannot recover at common law for the loss of society or services resulting from her death, but only for the loss between the injuries and her death.¹⁰⁶ Under the statutes, however, giving a right of action, where a death is caused by the wrongful act of another, the husband, when a beneficiary under the statute, may recover for the loss of services resulting from his wife's death.¹⁰⁷

ACTIONS FOR ENTICING, HARBORING, OR ALIENATION OF AFFECTION.

45. A husband has a right of action for damages against any one who entices away or harbors his wife, or who alienates her affections, though there is no enticing away.

EXCEPTIONS—(a) A person who harbors a wife, not from improper motives, but from motives of humanity, as where she has been forced to leave her husband from fear of bodily harm, is not liable.

(b) Parents are not liable for advising a daughter to leave her husband, or for harboring her, where they act from proper motives; and, in this class of cases, proper motives will be presumed until the contrary appears. The same rule has been applied to the case of parent and son.

46. In most, but not all, jurisdictions, a wife has a right of action against one who entices away, or alienates the affections of, her husband; at least, where

¹⁰⁵ *Meese v. City of Fond du Lac*, 48 Wis. 323, 4 N. W. 406.

¹⁰⁶ *Baker v. Bolton*, 1 Camp. 493; *Green v. Railroad Co.*, 28 Barb. (N. Y.) 9; *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595; *Nixon v. Ludlam*, 50 Ill. App. 273.

¹⁰⁷ *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270; *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329; *Delaware, L. & W. R. Co. v. Jones*, 128 Pa. St. 308, 18 Atl. 330.

her disability to sue alone has been removed by statute. According to the weight of opinion, the right exists even at common law.

Action by Husband.

Since a husband is entitled to his wife's society and services, he has a right of action against one who alienates her affections from him, or who deprives him of her society and services by enticing her to leave him, or by harboring her.¹⁰⁸ It is not necessary to the husband's cause of action that the wife shall have been enticed away from him. An action will lie for alienation of her affections, although she has not left his house, and he has suffered no pecuniary loss. "It is perhaps true that the theory of such an action was originally the loss of services, for it was presumed that by the seduction or alienation the wife's services were rendered less valuable. But whatever may have been the principle, originally, upon which this class of actions was maintained, it is certain that the weight of modern authority bases the action on the loss of the consortium; that is, the society, companionship, conjugal affections, fellowship, and assistance. The suit is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there should be any pecuniary loss whatever."¹⁰⁹

The husband's right of action in this class of cases is not defeated by showing that he and his wife did not live happily together. But if, on account of their unhappy relations, the wife's comfort and society are of less moment to the husband, the state of their

¹⁰⁸ 1 Jag. Torts, 466; Winsmore v. Greenbank, Willes, 577; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Rinehart v. Bills, 82 Mo. 534; Modisett v. McPike, 74 Mo. 636; Hadley v. Heywood, 121 Mass. 236; Gilchrist v. Bale, 8 Watts (Pa.) 355; Barbee v. Armstead, 10 Ired. (N. C.) 530; Higham v. Vanosdol, 101 Ind. 161; Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417; Heermance v. James, 47 Barb. (N. Y.) 120; Huot v. Wise, 27 Minn. 68, 6 N. W. 425; Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252.

¹⁰⁹ Adams v. Main, 3 Ind. App. 232, 29 N. E. 792; Heermance v. James, 47 Barb. (N. Y.) 120; Rinehart v. Bills, 82 Mo. 534; Bigaouette v. Paulet, 134 Mass. 123; Sikes v. Tippins, 85 Ga. 231, 11 S. E. 662; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17.

relations may be shown in mitigation of damages.¹¹⁰ Such evidence, however, must be confined to the time prior to her relations with the defendant.¹¹¹

In these cases, whether there was malice or an improper motive is always a material consideration. Thus, where a woman is forced to leave her husband from fear of bodily harm, or other sufficient cause, no action will lie against one who receives her from motives of humanity.¹¹² The grounds that will be sufficient to justify a stranger in interfering, and harboring another's wife, must be extreme. For instance, it has been held that ill treatment, in order to justify a person, not a near relative, in harboring another's wife to secure her from such treatment by her husband, must be of so cruel a character as to endanger her personal safety, and to force her to remain away from her husband, and the burden of proving that it is so is on such party.¹¹³

The question of motive most frequently arises in cases where a parent induces a daughter to leave her husband, or harbors her after she has left him. The rule is that, in the absence of improper motives, the parent is not liable to the husband. And stronger proof is necessary as against a parent than as against a stranger. Mr. Schouler states the legal doctrine to be "that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control,—the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the

¹¹⁰ *Willis v. Bernard*, 8 Bing. 376; *Palmer v. Crook*, 7 Gray (Mass.) 418; *Hadley v. Heywood*, 121 Mass. 236; *Hokz v. Dick*, 42 Ohio St. 23; *Gilchrist v. Bale*, 8 Watts (Pa.) 355; *Bailey v. Bailey* (Iowa) 63 N. W. 341.

¹¹¹ *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252.

¹¹² *Philp v. Squire*, 1 Peake, 82; *Berthon v. Cartwright*, 2 Esp. 480; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Barnes v. Allen*, 30 Barb. (N. Y.) 663; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417; *Turner v. Estes*, 3 Mass. 317. And see *Modisett v. McPike*, 74 Mo. 636. One allowing his wife's mother to remain in his house against her husband's wishes is not liable to the husband on account of the mere failure to expel her, where there is no concealment, denial of free access, or attempt to influence her to remain. *Turner v. Estes*, *supra*.

¹¹³ *Johnson v. Allen*, *supra*.

separation; but that otherwise his remedy is complete against all persons whomsoever who have lent their countenance to any scheme for breaking up his household."¹¹⁴ In the case of a father harboring his daughter, Chancellor Kent held that stronger proof is necessary against a father than against a stranger, and that it ought to appear either that he detains the wife against her will, or that he enticed her away from her husband from improper motives.¹¹⁵ "A father's house," he said, "is always open to his children. Whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum."

The rule, therefore, is well settled that a husband cannot maintain an action against his wife's parents for enticing her away from him, or for harboring her, unless it is both alleged and proved that they acted from improper motives.¹¹⁶ As was said by the Tennessee court: "There can be no law to restrain the parent from honestly and sincerely endeavoring to protect his daughter, by means of counsel and warning, from impending ruin or disgrace, or wreck of her happiness or usefulness for life. There is a marked distinction between the rights and privileges of a parent, in such cases, and those of a mere intermeddling stranger. A father has no right to restrain his daughter from returning to her husband, if she desires to do so. On the other hand, he may lawfully give counsel and honest advice for her own good, and shelter her in his own house, if she chooses to remain with him."¹¹⁷

The same doctrine, it has been held, applies where a wife seeks to recover from her husband's parent for enticing him away.¹¹⁸ And there is no reason why it should not apply where a brother

¹¹⁴ Schouler, *Husb. & W.* § 64.

¹¹⁵ *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196.

¹¹⁶ *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; *Payne v. Williams*, 4 Baxt. (Tenn.) 585; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Rabe v. Hanna*, 5 Ohio, 530; *Huling v. Huling*, 32 Ill. App. 519; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Burnett v. Burkhead*, 21 Ark. 77; *Holtz v. Dick*, 42 Ohio St. 23; *Turner v. Estes*, 3 Mass. 317; *Friend v. Thompson*, Wright (Ohio) 636; *Westlake v. Westlake*, 34 Ohio St. 621; *Smith v. Lyke*, 13 Hun, 204; *White v. Ross*, 47 Mich. 172, 10 N. W. 189.

¹¹⁷ *Payne v. Williams*, *supra*.

¹¹⁸ *Reed v. Reed*, *supra*.

advises and harbors his sister, or where a wife is advised or harbored by one who has stood in loco parentis towards her.¹¹⁹

A parent or person in loco parentis will only be protected under this doctrine where he acted from proper motives. Even a mother is liable to her son-in-law if she entices her daughter away from him, or harbors her, not from proper motives, but because she does not like him.¹²⁰

A person may render himself liable under this doctrine by inducing a woman to obtain a divorce from her husband, or vice versa. It has been held that, though a wife may have just cause for, and may obtain, a divorce from her husband, yet, if she would not have obtained the divorce except for the unsolicited interference of a third person, the divorce does not constitute any defense to an action by the husband for loss of his wife's society, though it would be otherwise if the wife sought the advice of her own motion.¹²¹

Action by Wife.

In some jurisdictions it has been held that neither at common law, nor under the modern statutes allowing married women to sue, can a wife maintain an action against another for enticing away her husband, or alienating his affections.¹²² By the great weight of authority, however, since the loss of service is not necessary to the action, and the right to each other's society and comfort is reciprocal, a wife may maintain such an action,—at least, where her common-law disability to sue alone has been removed by statute; and, indeed, by the weight of modern authority, the action will lie even at common law, and in the absence of such a statute.¹²³

¹¹⁹ See *Glass v. Bennett*, *supra*.

¹²⁰ *Holtz v. Dick*, 42 Ohio St. 23. And see *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276.

¹²¹ *Modisett v. McPike*, 74 Mo. 636.

¹²² *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522 (Cassoday, J., dissenting). In this case the question is considered at length, and many authorities are collated. See, also, *Doe v. Roe*, 82 Me. 503, 20 Atl. 83.

¹²³ *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842; *Westlake v. Westlake*, 34 Ohio St. 621; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; *Railsback v. Railsback* (Ind. App.) 40 N. E. 276; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027; *Seaver v. Adams* (N. H.) 19 Atl. 776;

The reasoning of these cases is "that, inasmuch as the husband has the right to sue for the loss of the consortium of the wife, there can be no intelligent reason why she should not possess the right to sue for the loss of the society, companionship, affections, and protection of the husband, which the law has vouchsafed to her."¹²⁴ "It was the boast of the common law that 'there is no right without a remedy,' and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. * * * The principle outlined in the maxim quoted requires that even where the common law, as it now exists, prevails, it should be held that a wife may have an action against the wrongdoer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this; for, in all the long category of human rights, there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy."¹²⁵

ACTION FOR CRIMINAL CONVERSATION.

47. An action for damages, known as an "action for criminal conversation," lies by a husband against one who has intercourse with his wife without his consent.

Closely allied to suits for enticing and harboring, and still more closely connected with suits for alienation of affection, are suits for

Bassett v. Bassett, 20 Ill. App. 543; *Huling v. Huling*, 32 Ill. App. 519; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Mehrhoff v. Mehrhoff*, 26 Fed. 13; *Waldron v. Waldron*, 45 Fed. 315; *Price v. Price* (Iowa) 60 N. W. 202; *Bailey v. Bailey* (Iowa) 63 N. W. 341; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577; *Breiman v. Paasch*, 7 Abb. N. C. (N. Y.) 249; *Baker v. Baker*, 16 Abb. N. C. (N. Y.) 293; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, Id. 226; *Jaynes v. Jaynes*, 39 Hun, 40; *Lynch v. Knight*, 9 H. L. Cas. 577. See *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328.

¹²⁴ *Adams v. Main*, supra.

¹²⁵ *Haynes v. Nowlin*, supra.

criminal conversation. In such an action a husband can recover damages against any one who has intercourse with his wife without his consent.¹²⁶ "Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary."¹²⁷ This action does not, like actions for enticing, harboring, or alienation of affection, rest on the loss of the wife's society, affection, or services; but it rests on the injury sustained by the defilement of the marriage bed, the invasion of the husband's exclusive right to marital intercourse, and the suspicion cast upon the legitimacy of the offspring.¹²⁸ One who commits rape is liable in this action.¹²⁹ The intercourse need not have been the result of seduction.¹³⁰ It is true that, as in actions for enticing, harboring, etc., the husband may, in an action for criminal conversation, show the alienation of his wife's affection, and the loss of her services, society, etc., but this only goes in aggravation of damages. It need not necessarily be shown, for the action is not based on any pecuniary loss.¹³¹ The relations on which the spouses lived, whether happy or otherwise, and previous acts of adultery, either by the husband or the wife,

¹²⁶ 3 Bl. Comm. 139; Add. Torts, 589; 1 Jag. Torts, 465, 467, and cases cited; 1 Bish. Mar., Div. & Sep. § 1365; *Hadley v. Heywood*, 121 Mass. 236; *Winter v. Henn*, 4 Car. & P. 498; *Croze v. Rutledge*, 81 Ill. 266; *Scripps v. Reilly*, 38 Mich. 23; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Dalton v. Dregge*, 99 Mich. 250, 58 N. W. 57; *Wood v. Mathews*, 47 Iowa, 409; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578; *Ferguson v. Smethers*, 70 Ind. 519; and cases hereafter cited.

¹²⁷ 3 Bl. Comm. 139.

¹²⁸ *Reeve*, Dom. Rel. (4th Ed.) 90; *Coeley*, Torts, 224; *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438; *Bigaouette v. Paulet*, 134 Mass. 123; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Yundt v. Hartrunft*, 41 Ill. 9; *Wood v. Mathews*, 47 Iowa, 409; *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442.

¹²⁹ *Egbert v. Greenwalt*, *supra*; *Bigaouette v. Paulet*, *supra*.

¹³⁰ *Weedon v. Timbrell*, 5 Term R. 360; *Wales v. Miner*, 89 Ind. 118; *Wood v. Mathews*, 47 Iowa, 409; *Hadley v. Heywood*, 121 Mass. 236.

¹³¹ See cases above cited. And see *Long v. Booe* (Ala.) 17 South. 716.

may always be shown, as bearing on the question of damages.¹³² But they cannot be relied upon to defeat the husband's action entirely. A husband may sue for criminal conversation, though he is living apart from his wife, and leading a dissolute life.¹³³

It is, of course, a good defense to the action, on the principle "*Volenti non fit injuria*," that the husband consented to the particular act of intercourse complained of, or that he gave his wife a general license to conduct herself with other men as she saw fit, or allowed her to live as a common prostitute.¹³⁴

When we consider the grounds upon which the action for criminal conversation rest, it would seem clear that a wife could not maintain such an action against another woman for having intercourse with her husband, and it has been so held.¹³⁵ There are cases to the contrary, or apparently so; but in these cases the court relied, as authority for their decision, upon those cases which uphold an action by a wife for alienation of her husband's affection, or for enticing him away.¹³⁶ As we have seen, the grounds for these

¹³² 3 Suth. Dam. 745; Add. Torts, 593; 2 Greenl. Ev. § 56; Reeve, Dom. Rel. (4th Ed.) 91; Winter v. Henn, 4 Car. & P. 494; Bromley v. Wallace, 4 Esp. 237; Coleman v. White, 43 Ind. 429; Browning v. Jones, 52 Ill. App. 597; Hadley v. Heywood, 121 Mass. 236; Conway v. Nicol, 34 Iowa, 533; Dance v. McBride, 43 Iowa, 624; Dalton v. Dregge, 99 Mich. 250, 58 N. W. 57; Smith v. Masten, 15 Wend. (N. Y.) 270; Shattuck v. Hammond, 46 Vt. 466; Norton v. Warner, 9 Conn. 172; Rea v. Tucker, 51 Ill. 110; Torre v. Summers, 2 Nott & McC. (S. C.) 267. In mitigation of damages, it may be shown that the wife was the seducer. Elsam v. Faucett, 2 Esp. 562; Ferguson v. Smethers, 70 Ind. 519.

¹³³ Browning v. Jones, 52 Ill. App. 597.

¹³⁴ Winter v. Henn, 4 Car. & P. 494; Hodges v. Windham, 1 Peake, 38; Bunnell v. Greathead, 49 Barb. (N. Y.) 106; Rea v. Tucker, 51 Ill. 110; Stumm v. Hummel, 39 Iowa, 478; Cook v. Wood, 30 Ga. 891; Sanborn v. Neilson, 4 N. H. 501; Schorn v. Berry, 63 Hun, 110, 17 N. Y. Supp. 572; Fry v. Drestler, 2 Yeates (Pa.) 278. Continued cohabitation by a husband with his wife after knowledge of acts of adultery by her does not bar his action for crim. con., though it may amount to such condonation as would bar a suit against his wife for a divorce. Sanborn v. Neilson, 4 N. H. 501; Clouser v. Clapper, 59 Ind. 548; Verholf v. Van Houwenlengen, 21 Iowa, 429; Sikes v. Tippins, 85 Ga. 231, 11 S. E. 662; Pomero v. Pomero, 10 Prob. Div. 174.

¹³⁵ Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438.

¹³⁶ Seaver v. Adams (N. H.) 19 Atl. 776; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389.

different kinds of action are different. Because a wife is allowed to maintain an action against a woman who entices her husband away from her, or alienates his affections without enticing him away, is no reason for holding that a wife can maintain an action against a woman for criminal conversation with her husband.¹³⁷ To entitle a wife to maintain an action against one who has intercourse with her husband, she must show something more than the mere fact of intercourse. She must show an enticing away, or alienation of the affection of, her husband. A husband can maintain an action for criminal conversation against one who commits a rape upon his wife. Assuming the possibility of a woman compelling a man, against his will, to have intercourse with her, it would hardly be contended that this alone would give the man's wife a right of action.

¹³⁷ See *Kroessin v. Keller*, *supra*; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83.

CHAPTER III.

RIGHTS IN PROPERTY AS AFFECTED BY COVERTURE.

- 48. Wife's Earnings.
- 49. Wife's Personalty in Possession.
- 50-51. Wife's Choses in Action.
- 52. Administration of Wife's Estate.
- 53. Wife's Chattels Real.
- 54. Wife's Estates of Inheritance—Curtesy.
- 55. Wife's Estates for Life.
- 56. Property Acquired by Wife as Sole Trader.
- 57. Wife's Equitable Separate Estate.
- 58. Wife's Statutory Separate Estate.
- 59. Wife's Rights in Husband's Property—Dower and Thirds.
- 60. Estates by the Entirety.
- 61. Community Property.

As has already been stated, the effect of marriage, at common law, is to suspend the legal existence of the wife, for most purposes, during coverture, and merge it in that of the husband. Upon this principle depend many of the rules relating to property as affected by marriage. Of course the husband's legal existence is not affected by marriage, and, therefore, property and property rights, owned or acquired by him, are not during his life affected by the marriage, though certain rights therein are given the wife on his death, and in some states by statute the doctrine of community property has been adopted from the civil law. As we shall now see, however, it is otherwise with regard to the property and property rights owned or acquired by the wife.

WIFE'S EARNINGS.

- 48. At common law the husband is entitled absolutely to his wife's earnings.**

At common law, the husband is entitled to the earnings of his wife. He takes all the proceeds of her industry, whether it is in the

form of money paid her, or other property.¹ The rule not only applies to earnings which have actually been received by him or by her, but it also applies to earnings which are due, unless there is an express promise to the wife. The husband alone is entitled to receive such earnings, and he must sue therefor in his own name.² In case of his death the action cannot be maintained by the wife, as she has never been entitled to the earnings, but must be brought by the personal representatives of the husband.³ The rules are different if the wife can show an express promise to her by the debtor. In such a case an action to recover the earnings may be maintained by the husband and wife,⁴ or by the wife alone after the death of the husband.⁵

It follows from this doctrine that the husband only can release the debtor from liability for the wife's earnings. The debtor cannot dis-

¹ *Offley v. Clay*, 2 Man. & G. 172; *Buckley v. Collier*, 1 Salk. 114; *Russell v. Brooks*, 7 Pick. (Mass.) 65; *McDavid v. Adams*, 77 Ill. 155; *Schwartz v. Saunders*, 40 Ill. 18; *Bear v. Hays*, 33 Ill. 250; *Prescott v. Brown*, 23 Me. 305; *Seitz v. Mitchell*, 94 U. S. 580; *Yopst v. Yopst*, 51 Ind. 61; *Turtle v. Muncy*, 2 J. J. Marsh. (Ky.) 52; *Armstrong v. Armstrong*, 32 Miss. 279; *Skillman v. Skillman*, 15 N. J. Eq. 478; *Bucher v. Ream*, 68 Pa. St. 421; *Reynolds v. Robinson*, 64 N. Y. 589; *Carleton v. Rivers*, 54 Ala. 467; *Hawkins v. Railroad Co.*, 119 Mass. 596; *Ewell*, Lead. Cas. 355, and cases there cited. As to the effect of the married woman's acts, see *Brooks v. Schwerin*, 54 N. Y. 343; *Birkbeck v. Ackroyd*, 74 N. Y. 353. "By the common law, the earnings of the wife, the product of her skill and labor, belong to the husband. They do not become the property of the wife, even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband, divesting himself of them or setting them apart for her separate use." *Skillman v. Skillman*, supra. And see *McLemore v. Pinkston*, 31 Ala. 206. The rule, of course, applies to the joint earnings of husband and wife, as where they work together in carrying on a boarding house, hotel, or any other business. *Shaeffer v. Sheppard*, 54 Ala. 244; *Bowden v. Gray*, 40 Miss. 547; *Reynolds v. Robinson*, 64 N. Y. 589; *Carleton v. Rivers*, 54 Ala. 467. Property purchased by the wife with the proceeds of her labor is within the rule. *Hawkins v. Railroad Co.*, 119 Mass. 596; *Carleton v. Rivers*, 54 Ala. 467.

² *Buckley v. Collier*, 1 Salk. 114; *Offley v. Clay*, 2 Man. & G. 172; *Russell v. Brooks*, 7 Pick. (Mass.) 65; *McDavid v. Adams*, 77 Ill. 155; *Gould v. Carlton*, 55 Me. 511.

³ *Prescott v. Brown*, 23 Me. 305; *Buckley v. Collier*, 1 Salk. 114.

⁴ *Prat v. Taylor*, Cro. Eliz. 61; *Brashford v. Buckingham*, Cro. Jac. 77, 205; *Weller v. Baker*, 2 Wils. 424.

⁵ *Prescott v. Brown*, 23 Me. 305.

charge his liability by paying the wife, and taking her separate receipt, unless the payment has been authorized by the husband.⁶ As will be seen in another place, the husband may appoint his wife his agent to receive her earnings; and, subject to restrictions as to creditors, he may give them to her.

Wife as Sole Trader.

As will presently be seen, the wife may, by the aid of a court of equity, under an agreement with her husband, carry on a separate trade or business for her own use and benefit, in which case, in equity, she will be entitled to hold the profits therefrom to her separate use.⁷

WIFE'S PERSONALTY IN POSSESSION.

49. At common law, the wife's personalty in possession vests exclusively in her husband, without any act on his part, and on his death passes to his personal representatives. This is true as to personalty owned by her at the time of the marriage, and personalty acquired during coverture, and as to personalty in her actual possession, and personalty in the actual possession of some third person not holding adversely.

EXCEPTIONS—The rule does not apply to the wife's paraphernalia; that is, such articles of wearing apparel, personal ornament, or convenience as are suitable to her rank and condition. These belong to the husband, like other personalty in possession; but, if undisposed of by him, they belong to the wife on his death.

At common law, all the personal property of a woman, including money, and goods and chattels of every description, which she has in possession at the time of her marriage, vests absolutely in her husband, and becomes as much his as if it had been originally acquired by him. He may dispose of it as he sees fit; it may be seized by his

⁶ *Offley v. Clay*, *supra*; *Russell v. Brooks*, *supra*.

⁷ *Post*, p. 111.

creditors and subjected to the payment of his debts; and on his death it will go to his personal representatives, even though the wife may be the survivor.⁸ The same rule applies to personalty acquired by the wife during coverture, whether by gift, bequest, purchase, or by her own labor.⁹ And it applies to money received as the proceeds of her real estate, either as rent or as purchase money on a sale thereof.¹⁰ If the wife's interest was that of a tenant in common, the husband assumes the same relation in her place.¹¹ Personalty in possession, though settled to the separate use of the wife, passes to him personally, on her death, *jure mariti*; for a wife's separate estate lasts only during coverture.¹²

Personal property which is constructively in the wife's possession vests in the husband equally with that in her actual possession. In legal contemplation, personalty of the wife, in the hands of another person, whose possession is not adverse, is in her possession. Thus a chattel in the hands of another under a contract for hire is in the wife's possession, since the possession of a bailee is that of the bailor.¹³ Likewise the possession of her agent is that of the wife;¹⁴ the

⁸ 2 Kent. Comm. 143; Co. Litt. 351b; 2 Bl. Comm. 434; *Lamphir v. Creed*, 8 Ves. 599; *Legg v. Legg*, 8 Mass. 99; *Crosby v. Otis*, 32 Me. 256; *Carleton v. Lovejoy*, 54 Me. 445; *Hawkin's Adm'r v. Craig*, 6 T. B. Mon. (Ky.) 254; *Morgan v. Bank*, 14 Conn. 99; *Tune v. Cooper*, 4 Sneed (Tenn.) 296; *Hoskins v. Miller*, 2 Dev. (N. C.) 360; *Caffey v. Kelly*, Busb. Eq. (N. C.) 48; *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Hyde v. Stone*, 9 Cow. (N. Y.) 230; *Colbert v. Daniel*, 32 Ala. 314, 327; *Rixey's Adm'r v. Deitrick*, 85 Va. 42, 6 S. E. 615.

⁹ *Newlands v. Paynter*, 4 Mylne & C. 408; *Carne v. Brice*, 7 Mees. & W. 183; *Shirley v. Shirley*, 9 Paige (N. Y.) 363; *Vreeland's Ex'rs v. Ryno's Ex'r*, 26 N. J. Eq. 160; *Kensington v. Dollond*, 2 Mylne & K. 184; *Ewing v. Helm*, 2 Tenn. Ch. 368. As to earnings of the wife, see ante, p. 83.

¹⁰ *Plummer v. Jarman*, 44 Md. 632; *Lichtenberger v. Graham*, 50 Ind. 288; *Hamlin v. Jones*, 20 Wis. 536; *Crosby v. Otis*, 32 Me. 256; *Martin v. Martin*, 1 N. Y. 473; *Sheriff of Fayette v. Buckner*, 1 Litt. (Ky.) 126; *Thomas v. Chicago*, 55 Ill. 403.

¹¹ *Hyde v. Stone*, 9 Cow. (N. Y.) 230; *Hopper v. McWhorter*, 18 Ala. 229.

¹² 2 Macq. Husb. & W. 288; *Molony v. Kennedy*, 10 Sim. 254; *Brown's Adm'rs v. Brown's Adm'rs*, 6 Humph. (Tenn.) 127.

¹³ *Whitaker v. Whitaker*, 1 Dev. (N. C.) 310; *Magee v. Toland*, 8 Port. (Ala.) 36; *Morrow v. Whitesides' Ex'r*, 10 B. Mon. (Ky.) 411; *Armstrong v. Simon-ton's Adm'r*, 2 Murph. (N. C.) 351; *Dade v. Alexander*, 1 Wash. (Va.) 30.

¹⁴ *Crosby v. Otis*, 32 Me. 256.

possession of a guardian is that of the ward;¹⁵ the possession of a donor retaining possession for life is that of the donee;¹⁶ and so generally chattels in the hands of another, not under a hostile claim, are in the possession of the owner.¹⁷ In Alabama it has been held that the possession of the wife must be actual, and not constructive;¹⁸ but the great weight of authority is against such a view.

When the property is in the hands of another, whose relations to the wife are those of a debtor, and not a bailee or servant, his possession is not the wife's possession. She has only a right to possession or a chose in action. For instance, money in bank is the property of the bank, and the wife has only a chose in action, the relation being purely that of debtor and creditor.¹⁹ So where a person received money from another to be appropriated to a married woman, the court held that, nothing having been done to vest any property in any coin as a chattel, the money did not vest in the husband, but remained a chose in action in the wife.²⁰ The rules relating to the wife's choses in action are explained in a subsequent section.

The husband's right to his wife's personalty in possession is the result of the marriage, and depends upon nothing else. It lasts as long as the marriage relation lasts. He does not lose the right by a divorce a mensa et thoro, or judicial separation,²¹ though it is otherwise in the case of a divorce a vinculo matrimonii, for that puts an end to the relation. The husband does not lose this right even by deserting his wife and living in adultery.²²

¹⁵ *Magee v. Toland*, supra; *Davis v. Rhame*, 1 McCord, Eq. (S. C.) 191; *Sallee v. Arnold*, 32 Mo. 532; *Miller v. Blackburn*, 14 Ind. 62; *Daniel v. Daniel*, 2 Rich. Eq. (S. C.) 118; *McDaniel v. Whitman*, 16 Ala. 343; *Chambers v. Perry*, 17 Ala. 726; *Davis' Appeal*, 60 Pa. St. 118.

¹⁶ *Banks' Adm'rs v. Marksberry*, 3 Litt. (Ky.) 275.

¹⁷ *Wallace v. Burden*, 17 Tex. 467; *Caffey v. Kelly*, Busb. Eq. (N. C.) 48; *Brown v. Fitz*, 13 N. H. 283; *Sausey v. Gardner*, 1 Hill (S. C.) 191.

¹⁸ *Mason v. McNeill's Ex'rs*, 23 Ala. 214; *Hair v. Avery*, 28 Ala. 273.

¹⁹ *Carr v. Carr*, 1 Mer. 543, note.

²⁰ *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Id.*, L. R. 4 Q. B. 500.

²¹ *Glover v. Proprietors of Drury Lane*, 2 Chit. 117; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Prescott v. Brown*, 23 Me. 305.

²² *Vreeland's Ex'rs v. Ryno's Ex'r*, 26 N. J. Eq. 160; *Russell v. Brooks*, 7 Pick. (Mass.) 65; *Armstrong v. Armstrong*, 32 Miss. 279; *Turtle v. Muney*, 2 J. J. Marsh. 82.

Wife's Paraphernalia.

The wife's paraphernalia, being such articles of wearing apparel, personal ornament, or convenience as are suitable to her rank,²³ which she had at the time of marriage, or which are given to her by her husband during coverture, follow a different rule. Like other personalty in possession, they belong to the husband; but, if not disposed of by him during his life, they become her absolute property.²⁴ In most states there are statutes making similar provisions for the widow.

WIFE'S CHOSSES IN ACTION.

50. A husband is entitled to his wife's choses in action if he reduces them to possession during coverture, but not otherwise. To reduce them to possession he must exert some act of ownership over them, with the intention of converting them to his own use.

51. EQUITY TO A SETTLEMENT—If necessary to ask the aid of a court of equity to reduce the wife's choses in action to possession, the husband must make suitable provision for the maintenance of the wife and children.

While the wife's personal property in possession vests absolutely in the husband by virtue of the marriage alone, without any act on his part, it is otherwise with her choses in action. These do not vest in him unless he does some act during the coverture by which he appropriates them to himself, or, as it is expressed, reduces them to possession. If he fails to reduce them to possession during coverture, and dies before his wife, or is divorced, they remain her property, and pass to her representatives.²⁵ If she dies first, and before

²³ 2 Bl. Comm. 436.

²⁴ Tipping v. Tipping, 1 P. Wms. 730; Schouler, *Husb. & W.* § 431.

²⁵ Co. Litt. 351b; 2 Kent, Comm. 135; Richards v. Richards, 2 Barn. & Adol. 447; Langham v. Nenny, 3 Ves. 467; Scawen v. Blunt, 7 Ves. 294; Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. St. 228; Legg v. Legg, 8 Mass. 99; Needles v. Needles, 7 Ohio St. 432; Burleigh v. Cottin, 2 Fost. (N. H.) 118;

they have been reduced to possession, they pass to her representatives.²⁶ If they are reduced to possession during coverture, they become, in most cases, absolutely his.²⁷ The rule applies to choses in action owned by the wife at the time of the marriage, as well as to those acquired during coverture.²⁸

What are Choses in Action.

A chose in action has been defined as a right to be asserted by action at law. But the term may include a right to be asserted in equity.²⁹ It includes all claims arising from contract, duty, or wrong, to enforce which resort may be had either to an action at law or to a suit in equity.³⁰ The term has never been satisfactorily defined by the courts; but since all personalty is either in possession or a chose in action, there is generally little difficulty in determining, in any particular case, whether the personalty in question is a chose in action. Stocks and bonds,³¹ bills of exchange and promis-

In *re Kintzinger's Estate*, 2 Ashmr. (Pa.) 455; *Polindexter v. Blackburn*, 1 Ired. Eq. (N. C.) 286; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329. In another place it will be seen that by statute, from a very early period, the husband has been entitled to administer on his wife's estate, and to recover the same for his own use, acting as administrator, subject, however, to the payment of her debts contracted before the marriage. In effect, therefore, he does acquire the right to his wife's choses in action, though not reduced to possession in her lifetime; but he takes the benefit of them burdened with liability for her debts *dum sola*. Post, p. 123.

²⁶ *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Walker's Adm'r v. Walker's Adm'r*, 41 Ala. 353; *Needles v. Needles*, 7 Ohio St. 432; *Burleigh v. Coffin*, 2 Fost. (N. H.) 118; *Tritt's Adm'r v. Colwell's Adm'r*, 31 Pa. St. 228.

²⁷ 2 Kent, Comm. 135; *Little v. Marsh*, 2 Ired. Eq. (N. C.) 18; *Tritt's Adm'r v. Colwell's Adm'r*, 31 Pa. St. 228. Of course, they then become personalty in possession, and subject to the rules laid down in the preceding section. Ante, p. 85. In case of an infant husband, the rule is the same, though he may die before reaching majority. *Ware v. Ware's Adm'r*, 28 Grat. (Va.) 670.

²⁸ *Bond v. Conway*, 11 Md. 512; *Wilder v. Aldrich*, 2 R. I. 518; *Lenderman v. Talley*, 1 Houst. (Del.) 523; *Hayward v. Hayward*, 20 Pick. (Mass.) 517.

²⁹ Note 50, infra.

³⁰ Schouler, *Husb. & W.* § 153.

³¹ *Brown v. Bokee*, 53 Md. 155; *Slaymaker v. Bank*, 10 Pa. St. 373; *Wells v. Tyler*, 5 Fost. (N. H.) 340.

sory notes,³² and other debts owing to the wife,³³ claims for damages for personal injuries, slander, or other torts against the wife,³⁴ checks and certificates of deposit,³⁵ are all choses in action within this rule. Though there is some authority to the contrary,³⁶ by the great weight of opinion legacies and distributive shares are also within the rule.³⁷

Reduction to Possession.

To vest his wife's choses in action in himself by reduction to possession, the husband must exert some positive act of dominion over them, with the intention of converting them to his own use.³⁸ The intention to take possession, without actually doing so, is not sufficient.³⁹ Nor is the actual taking possession sufficient, if there is no intent to convert to his own use.⁴⁰ Taking possession, however, is, in

³² *Gaters v. Madeley*, 6 Mees. & W. 423; *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Phelps v. Phelps*, Id. 556; *Lenderman v. Talley*, 1 Houst. (Del.) 523.

³³ *Clapp v. Inhabitants*, 10 Pick. (Mass.) 463.

³⁴ *Anderson v. Anderson*, 11 Bush (Ky.) 327.

³⁵ *Rodgers v. Bank*, 69 Mo. 560.

³⁶ *Holbrook v. Waters*, 19 Pick. (Mass.) 354; *Wheeler v. Bowen*, 20 Pick. (Mass.) 563; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Griswold v. Penniman*, 2 Conn. 564.

³⁷ *Schouler*, *Husb. & W.* § 153; 2 Kent, *Comm.* 135; *Garforth v. Bradley*, 2 Ves. Sr. 675; *Carr v. Taylor*, 10 Ves. 574; *Tucker v. Gordon*, 5 N. H. 564; *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Howard v. Bryant*, 9 Gray (Mass.) 239; *Probate Court v. Niles*, 32 Vt. 775; *Smilie's Estate*, 22 Pa. St. 130; *Wheeler v. Moore*, 13 N. H. 478; *Curry v. Fulkinson's Ex'rs*, 14 Ohio, 100; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652; *Hooper v. Howell*, 50 Ga. 165.

³⁸ *Blount v. Bestland*, 5 Ves. 515; *Baker v. Hall*, 12 Ves. 497; *Parker v. Lechmere*, 12 Ch. Div. 256; *In re Hinds' Estate*, 5 Whart. (Pa.) 138; *Mayfield v. Clifton*, 3 Stew. (Ala.) 375; *Standeford v. Devol*, 21 Ind. 404; *Needles v. Needles*, 7 Ohio St. 432; *Brown v. Bokee*, 53 Md. 155; *Cox v. Scott*, 9 Baxt. (Tenn.) 305; *George v. Goldsby*, 23 Ala. 326; *Sale v. Saunders*, 24 Miss. 24; *Moyer's Appeal*, 77 Pa. St. 482; *Grebill's Appeal*, 87 Pa. St. 105; *Williams v. Sloan*, 75 Va. 137; *Arrington v. Yarbrough*, 1 Jones, Eq. (N. C.) 72; *Hooper v. Howell*, 50 Ga. 165.

³⁹ *Blount v. Bestland*, 5 Ves. 515; 1 Bright, *Husb. & W.* 36.

⁴⁰ *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413; *In re Hinds' Estate*, 5 Whart. (Pa.) 138; *Mayfield v. Clifton*, 3 Stew. (Ala.) 375; *Hall v. Young*, 37 N. H. 134; *Standeford v. Devol*, 21 Ind. 404; *Moyer's Appeal*, 77 Pa. St. 482; *Miller v. Aram*, 37 Wis. 142; *Barber v. Slade*, 30 Vt. 191; *Barron v. Barron*, 24 Vt. 375.

the absence of evidence to the contrary, presumed to be with such an intent, and a reduction to possession.⁴¹

"That reduction into possession which made the chose absolutely, as well as potentially, the husband's, was a reduction into possession not of the thing, but of the title to it."* As to what acts are to be deemed a sufficient reduction to possession of his wife's chose in action by a husband, Chancellor Kent says: ⁴² "The rule is that, if the husband appoints an attorney to receive the money, and he receives it; ⁴³ or if he mortgages the wife's choses in action, or assigns them without reservation, for a valuable consideration; ⁴⁴ or if he recovers her debt by a suit in his own name; or if he releases the debt by taking a new security in his own name,—in all these cases, upon his death, the right of survivorship in the wife to the property ceases. And if the husband obtains a judgment or decree as to money to which he was entitled in right of his wife, and the suit was in his own name alone, the property vests in him by the recovery, and is so changed as to take away the right of survivorship in the wife. If the suit was in their joint names, and he died before he had reduced the property to possession, the wife, as survivor, would take the benefit of recovery.⁴⁵ * * * If he takes possession in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife to the property if she survives him. The property

⁴¹ Johnston's Adm'rs v. Johnston, 1 Grant, Cas. (Pa.) 468; In re Hinds' Estate, supra.

* Tritt v. Colwell, 31 Pa. St. 228.

⁴² 2 Kent, Comm. 137.

⁴³ As to receipt by attorney or agent, see Turton v. Turton, 6 Md. 375; Alexander v. Crittenden, 4 Allen (Mass.) 342. The agent or attorney must be acting for the husband, and not for the wife, nor for the husband and wife. See Fleet v. Perrins, L. R. 3 Q. B. 536; Hill v. Hunt, 9 Gray (Mass.) 66.

⁴⁴ Carteret v. Paschal, 3 P. Wms. 197; Bates v. Dandy, 2 Atk. 206; Jewson v. Moulson, Id. 417; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464, 3 Cow. (N. Y.) 590; Lowry v. Houston, 3 How. (Miss.) 394; Case of Siter, 4 Rawle (Pa.) 468; Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. St. 228. It is otherwise where there is no consideration for the assignment. Burnett v. Kinnaston, 2 Vern. 401; Hartman v. Dowdel, 1 Rawle (Pa.) 279. Indorsement and transfer of bill or note. Mason v. Morgan, 2 Adol. & E. 30; Evans v. Secrest, 3 Ind. 545.

⁴⁵ Hilliard v. Hambridge, Aleyn, 36; McDowd v. Charles, 6 Johns. Ch. (N. Y.) 132; Searing v. Searing, 9 Paige (N. Y.) 283.

must come under the actual control and possession of the husband, quasi husband, or the wife will take, as survivor, instead of the personal representatives of the husband."

Assignees in bankruptcy of the husband possess the same rights as the husband to reduce the wife's choses in action to possession, but they possess no greater rights; and, if the husband dies before they have reduced them to possession, they survive to the wife.⁴⁶

Reduction to possession of a part of a claim due the wife is not a reduction of the whole, so as to bar the wife's right, as survivor, to the residue. Collection of interest, for instance, is not a reduction of the principal to possession.⁴⁷ The same is true of the receipt of a partial payment on the principal,⁴⁸ the receipt of dividends on stock,⁴⁹ etc.

Wife's Equity to a Settlement.

Whenever it was necessary for the husband, or one claiming in his right, as an assignee, for instance, to ask the aid of a court of equity to reduce the wife's personalty to possession, the court, in pursuance of the principle that he who seeks equity must do equity, required of the husband that he make a suitable settlement for the maintenance of the wife and children, unless they were already sufficiently provided for. This right of the wife is called the wife's equity to a settlement, or the wife's equity.⁵⁰ There is much doubt and conflict as to the circumstances under which a court of equity can thus interfere to compel a provision for the wife out of her property. Story says: "The principal, if not the sole, cases, in which courts of equity now interfere to secure the wife her equity to a settlement are: First,

⁴⁶ 2 Kent, Comm. 138; Mitford v. Mitford, 9 Ves. 87; Van Epps v. Van Deusen, 4 Paige (N. Y.) 64; Outcalt v. Van Winkle, 2 N. J. Eq. 516.

⁴⁷ Howman v. Corle, 2 Vern. 190; Stanwood v. Stanwood, 17 Mass. 57; Dunn v. Sargent, 101 Mass. 336.

⁴⁸ Nash v. Nash, 2 Madd. 133.

⁴⁹ Dunn v. Sargent, *supra*.

⁵⁰ 2 Kent, Comm. 139-143; Story, Eq. Jur. § 1402 et seq.; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464, 3 Cow. (N. Y.) 590; Parsons v. Parsons, 9 N. H. 309 (an elaborate examination into the history and doctrine of the wife's equity); Howard v. Moffatt, 2 Johns. Ch. (N. Y.) 266; Duvall v. Bank, 4 Gill & J. (Md.) 282; Whitesides v. Dorris, 7 Dana (Ky.) 106; Perryclear v. Jacobs, 2 Hill, Eq. (S. C.) 509; Dearin v. Fitzpatrick, Meigs (Tenn.) 551.

where the husband seeks aid or relief in regard to her property; secondly, where he makes an assignment of her equitable interests; thirdly, where she seeks the like relief as plaintiff against her husband or his assignees in regard to her equitable interests.”⁵¹ The last class includes the first two in effect, for, if she may proceed against him, or his assignees, in all cases, it covers the whole ground.⁵² While there are some cases which seem to limit the power of courts of equity, in enforcing the wife's equity, to cases in which the husband or his assignee is seeking the aid of the court to reduce the wife's property to possession, the great weight of authority is against any such limitation, and in favor of the statement which is above quoted from Story. In an early New York case it was said: “If the husband can lay hold of the property without the aid of a court of equity, he may do it; the court has not the means of enforcing a settlement by interfering with his remedies at law.”⁵³ And there are other statements to the same effect.⁵⁴ In a later New York case, however, Chancellor Kent said: “It is now understood to be settled that the wife's equity attaches upon her personal property when it is subject to the jurisdiction of the court, and is the object of the suit, into whosoever's hands it may have come, or in whatever manner it may have been transferred. The same rule applies whether the application be by the husband or his representatives or assignees to obtain possession of the property, or whether it be by the wife or her trustee, or by any person partaking of that character, praying for that provision out of that property.”⁵⁵ This broader jurisdiction of courts to enforce the wife's equity is amply supported by authority.⁵⁶

The jurisdiction extends to restraining the husband, or one claiming in his right, as assignee or otherwise, from obtaining possession of the wife's property by an action at law, and thereby defeating her equity to a settlement. As was said by Chancellor Walworth: “If

⁵¹ 2 Story, Eq. 633.

⁵² *Parsons v. Parsons*, *supra*.

⁵³ *Howard v. Moffatt*, 2 Johns. Ch. (N. Y.) 206.

⁵⁴ See *Bryan v. Bryan*, 1 Dev. Eq. (N. C.) 47.

⁵⁵ *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 464, 3 Cow. (N. Y.) 590.

⁵⁶ 2 Kent, Comm. 139-142; *Dumond v. Magee*, 4 Johns. Ch. (N. Y.) 318; *Dearin v. Fitzpatrick*, Meigs (Tenn.) 551; *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391.

the wife is entitled to such an equity upon a bill filed by a husband or his assignee, or by a third person, as all the cases upon this subject admit, I see no valid objection in principle against granting her similar relief where the husband, or the general assignee in bankruptcy, is endeavoring to deprive her of that equity by an unconscientious proceeding at law."⁵⁷ It is well settled that the wife's equity may be enforced against assignees of the husband.⁵⁸

This protection to the wife by enforcing a settlement out of her property cannot be afforded in some of the states, either because there is no court of chancery, or because the court upon which equity jurisdiction has been conferred is limited in its powers, so that it cannot exercise full equity jurisdiction.⁵⁹

A wife may waive her equity to a settlement, if she does so apart from her husband, and under the direction of the court.⁶⁰ And she loses the right thereto if she is guilty of adultery.⁶¹ No allowance will be made to her out of her property, if her husband has made an adequate settlement upon her.⁶²

ADMINISTRATION OF WIFE'S ESTATE.

52. Under very early statutes, and perhaps even at common law, the husband is entitled to administer on his wife's estate. He may, as administrator, recover her choses in action for his own benefit; but he takes subject to her debts contracted dum sola.

⁵⁷ *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 74. For cases in which the court has interfered by restraining the husband or his assignee from proceeding in a court of law or probate to reduce a debt or legacy due the wife to his possession, etc., see 2 Kent, Comm. 139-142; *Fry v. Fry*, 7 Paige (N. Y.) 462; *Dumond v. Magee*, 4 Johns. Ch. (N. Y.) 318.

⁵⁸ 2 Story, Eq. Jur. § 1412; *Moore v. Moore*, 14 B. Mon. (Ky.) 259.

⁵⁹ *Yohe v. Barnett*, 1 Bin. (Pa.) 358; *In re Miller's Estate*, 1 Ashm. (Pa.) 323; *Parsons v. Parsons*, 9 N. H. 309; *Allen v. Allen*, 6 Ired. Eq. (N. C.) 293.

⁶⁰ *Schouler, Husb. & W.* § 162; *Coppedge v. Threadgill*, 3 Sneed (Tenn.) 577.

⁶¹ *Ball v. Montgomery*, 2 Ves. Jr. 191; *Fry v. Fry*, 7 Paige (N. Y.) 462; *Carter v. Carter*, 14 Smedes & M. (Miss.) 59.

⁶² 2 Kent, Comm. 142, 143.

As has just been shown, if the wife dies, leaving her husband surviving her, before he has reduced her chose in action to possession, it goes to her personal representative.⁶³ The husband, therefore, does not take it strictly as survivor. Because of another doctrine, however, he does acquire it in effect. He is entitled to recover it to his own use, by acting as her administrator. Her personal property in possession goes to him, as has been seen, as survivor strictly, and not as her administrator, for such property vests in him absolutely.⁶⁴ Her choses in action not reduced to possession by him before her death he must recover as her administrator. When he has so recovered them, he is entitled to take them for his own use, *jure mariti*.⁶⁵ It has been said that this right probably existed at common law.⁶⁶ At any rate, it was conferred by statute at an early period. It was given in England by the statute of distributions of 22 & 23 Car. II. and the twenty-fifth section of the statute of 29 Car. II. c. 3, in explanation thereof; and these statutes were substantially re-enacted in this country.⁶⁷

This right of the husband extends to choses in action which were settled to the separate use of the wife, unless previously disposed of by her, for her separate estate lasts only during coverture.⁶⁸ The right is subject to this qualification: that the estate of the wife is

⁶³ Ante, p. 88.

⁶⁴ Ante, p. 85.

⁶⁵ 2 Bl. Comm. 515; 2 Kent, Comm. 136; *Watt v. Watt*, 3 Ves. 244; *Garforth v. Bradley*, 2 Ves. Sr. 675; *Richards v. Richards*, 2 Barn. & Adol. 447; *Whitaker v. Whitaker*, 6 Johns. (N. Y.) 112; *Hoskins v. Miller*, 2 Dev. (N. C.) 360; *Humphrey v. Bullen*, 1 Atk. 458; *Squib v. Wyn*, 1 P. Wms. 380; *Judge of Probate v. Chamberlain*, 3 N. H. 129.

⁶⁶ 2 Bl. Comm. 515, 516; *Hoskins v. Miller*, supra.

⁶⁷ "The foundation of this claim has been variously stated. By some it is said to be derived from the statute of 31 Edw. III., on the ground of the husband's being 'the next and most lawful friend' of his wife, while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statute. But the right, however founded, is now unquestionable, and is expressly confirmed by the statute 29 Car. II. c. 3." 1 Williams, Ex'rs, 410. See *Judge of Probate v. Chamberlain*, 3 N. H. 129. Kent, however, bases the right on the statutes of 22 & 23 Car. II., and 29 Car. II. c. 3, § 25, as stated in the text.

⁶⁸ 2 Macq. Husb. & W. 288; *Schouler*, Husb. & W. § 196; *Proudley v. Fielder*, 2 Mylne & K. 57; *Ransom v. Nichols*, 22 N. Y. 110.

liable to the payment of her debts contracted *dum sola*, and the husband takes subject to this liability.⁶⁹

In many of the states this doctrine has been abolished by statute, and the husband, if he administers on his wife's estate, must account. He cannot recover for his own use.⁷⁰

WIFE'S CHATTELS REAL.

53. The husband has the enjoyment of his wife's chattels real—leases and terms for years—during his life, with the power to dispose of and incumber them, and they are liable for his debts. If undisposed of on his death, they go to the wife. On the wife's death they go to him.

Leases and terms for years are known as "chattels real." The husband is entitled to the enjoyment of his wife's chattels real, and may sell, assign, mortgage, or otherwise dispose of them during his life,⁷¹ and they are liable for his debts.⁷² He cannot dispose of them by will so as to debar a surviving wife, though his disposition by will is valid if his wife is not the survivor.⁷³ The wife's chattels real which have not been appropriated by the husband during his life, or taken by his creditors, belong to the wife in her own right, if she is the survivor, like her choses in action, and belong absolutely to the husband, if he is the survivor, like her personalty in possession.⁷⁴

⁶⁹ 2 Kent, Comm. 136; *Heard v. Stamford*, 3 P. Wms. 409; *Donnington v. Mitchell*, 2 N. J. Eq. 243.

⁷⁰ *Curry v. Fulkinson's Ex'rs*, 14 Ohio, 100; *Baldwin v. Carter*, 17 Conn. 201.

⁷¹ Co. Litt. 36b; 2 Kent, Comm. 135; *Grute v. Locroft*, Cro. Eliz. 287; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175.

⁷² 2 Kent, Comm. 135; *Miles v. Williams*, 1 P. Wms. 258.

⁷³ Co. Litt. 351a; 2 Kent, Comm. 135; *Garforth v. Bradley*, 2 Ves. Sr. 675; *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Parsons v. Parsons*, 9 N. H. 309.

⁷⁴ Co. Litt. 351a; 2 Kent, Comm. 135; *Doe v. Polgrean*, 1 H. Bl. 535.

WIFE'S ESTATES OF INHERITANCE.

54. The husband acquires by marriage the usufruct of his wife's estates of inheritance

(a) During coverture, and

(b) When there is issue of the marriage born alive, then for life, as tenant by the curtesy.

Where at the time of marriage or during coverture a woman is seised of an estate of inheritance in land, the husband is entitled to its usufruct. His estate lasts at least during coverture; and in case there is issue of the marriage born alive capable of inheriting her estate, his estate continues as tenant by the curtesy initiate during the wife's life, and as tenant by the curtesy consummate, after her death, for the remainder of his life.⁷⁵ The husband's estate extends only to the use of the land. He is entitled to the rents, issues, and profits,⁷⁶ and upon his death the emblements growing upon the land go to his representatives.⁷⁷

⁷⁵ Co. Litt. 351a; 2 Bl. Comm. 126; 2 Kent, Comm. 130; *Breeding v. Davis*, 77 Va. 639; *Butterfield v. Beall*, 3 Ind. 203; *Junction R. Co. v. Harris*, 9 Ind. 184; *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Thomas v. Sheppard*, 2 McCord, Eq. (S. C.) 36; *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692; *Clarke's Appeal*, 79 Pa. St. 376; *Rogers v. Brooks*, 30 Ark. 612; *Laidley v. Land Co.*, 30 W. Va. 505, 4 S. E. 705. In *Van Duzer v. Van Duzer*, *supra*, it was held that the court cannot, even in equity, interfere with the husband's rights as tenant by the curtesy initiate, even where the husband is improvident, and to allow him to dispose of his interest, or to allow it to be taken by his creditors, would expose the wife and children to beggary. There are four requisites of an estate by the curtesy, namely: (1) Marriage, (2) seisin of the wife, (3) birth of issue alive, and (4) death of the wife. During the wife's life, after issue born alive, the husband is said to be tenant by the curtesy initiate. It is only upon her death that he becomes tenant by the curtesy consummate. *Breeding v. Davis*, 77 Va. 639. The estate of the husband as tenant by the curtesy has been abolished in some states, but not in all. As to the effect of the married women's acts, see *Breeding v. Davis*, *supra*.

⁷⁶ Co. Litt. 29a; 2 Kent, Comm. 130; *Clapp v. Inhabitants*, 10 Pick. (Mass.) 463; *Jones v. Patterson*, 11 Barb. (N. Y.) 572.

⁷⁷ 2 Kent, Comm. 131; *Reeve*, Dom. Rel. 31, 32; *Weems v. Bryan*, 21 Ala. 302; *Spencer v. Lewis*, 1 Houst. (Del.) 223. The husband's tenant has the

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⁶⁹ 2 Kent, Comm. 136; *Heard v. Stamford*, 3 P. Wms. 409; *Donnington v. Mitchell*, 2 N. J. Eq. 243.

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⁷¹ Co. Litt. 36b; 2 Kent, Comm. 135; *Grute v. Locroft*, Cro. Eliz. 287; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175.

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⁷⁵ Co. Litt. 351a; 2 Bl. Comm. 126; 2 Kent, Comm. 130; *Breeding v. Davis*, 77 Va. 639; *Butterfield v. Beall*, 3 Ind. 203; *Junction R. Co. v. Harris*, 9 Ind. 184; *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Thomas v. Sheppard*, 2 McCord, Eq. (S. C.) 36; *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692; *Clarke's Appeal*, 79 Pa. St. 376; *Rogers v. Brooks*, 30 Ark. 612; *Laidley v. Land Co.*, 30 W. Va. 505, 4 S. E. 705. In *Van Duzer v. Van Duzer*, *supra*, it was held that the court cannot, even in equity, interfere with the husband's rights as tenant by the curtesy initiate, even where the husband is improvident, and to allow him to dispose of his interest, or to allow it to be taken by his creditors, would expose the wife and children to beggary. There are four requisites of an estate by the curtesy, namely: (1) Marriage, (2) seisin of the wife, (3) birth of issue alive, and (4) death of the wife. During the wife's life, after issue born alive, the husband is said to be tenant by the curtesy initiate. It is only upon her death that he becomes tenant by the curtesy consummate. *Breeding v. Davis*, 77 Va. 639. The estate of the husband as tenant by the curtesy has been abolished in some states, but not in all. As to the effect of the married women's acts, see *Breeding v. Davis*, *supra*.

⁷⁶ Co. Litt. 29a; 2 Kent, Comm. 130; *Clapp v. Inhabitants*, 10 Pick. (Mass.) 463; *Jones v. Patterson*, 11 Barb. (N. Y.) 572.

⁷⁷ 2 Kent, Comm. 131; *Reeve*, Dom. Rel. 31, 32; *Weems v. Bryan*, 21 Ala. 302; *Spencer v. Lewis*, 1 Houst. (Del.) 223. The husband's tenant has the

occupant of the land during the life of such other person. The husband can dispose of or incumber the estate to the extent of his interest in it. His representatives take as emblements the crops growing at his death.⁹²

PROPERTY ACQUIRED BY WIFE AS SOLE TRADER.

56. In equity, by agreement with her husband, a married woman may become a sole trader, and carry on a trade or business for her separate use, in which case she will be entitled, in equity, to hold the stock in trade and profits as her separate property.

The common-law rule, giving the husband an absolute right to his wife's earnings, is so far modified in equity that by the aid of equity she is enabled to carry on a separate trade or business, and hold the property connected with such trade or business, and the profits therefrom, to her separate use. When a husband has agreed with his wife that she may carry on a separate trade for her own use and benefit, equity will protect the wife's interests, and treat the husband, when no trustees have been appointed, as trustee for the wife as to her stock in trade and the profits of the business.⁹³ In another chapter this doctrine will be considered more at length.⁹⁴

WIFE'S EQUITABLE SEPARATE ESTATE.

57. In equity a married woman may hold as a feme sole, and free from the control of her husband, property, real or personal, settled to her sole and separate use.

As will be fully explained in a subsequent chapter, in order to mitigate the hardships arising from the rules of the common law giving to the husband rights in his wife's property, equity has created

⁹² 2 Kent, Comm. 134.

⁹³ Story, Eq. Jur. § 1387; Ashworth v. Outram, 5 Ch. Div. 923; Partridge v. Stocker, 36 Vt. 108; James v. Taylor, 43 Barb. (N. Y.) 530; Penn v. Whitehead, 17 Grat. (Va.) 503.

⁹⁴ Post, p. 111.

a doctrine by which a married woman may acquire and hold a separate estate, both real and personal, independently of her husband, and free from his control. For this purpose equity treats married women, in relation to their separate property, as if sole. The doctrine is a creature of equity only, and is unknown to the common law.⁹⁵

WIFE'S STATUTORY SEPARATE ESTATE.

58. By modern statutes in all the states certain property owned or acquired by married women, and in some states all the property owned or acquired by them, remains their separate property.

In all of the states, statutes have been enacted changing the common-law rules in so far as they give the husband rights in his wife's property. In none of the states is the old common law in force to the full extent. Perhaps by statute in all the states the real property owned by a woman at the time of her marriage remains her separate property. In many states real property acquired by her after marriage by descent, devise, or purchase, and in some states real property acquired by her in any way, becomes and remains her separate property. In most states the personal property owned by a woman at the time of her marriage remains her separate property. In most states, also, personal property acquired by her after marriage, by bequest or descent, and in some states by purchase, becomes and remains her separate property. The effect of these statutes will be considered at length in a subsequent chapter.⁹⁶

WIFE'S RIGHTS IN HUSBAND'S PROPERTY.

59. At the death of the husband the wife is entitled at common law, or under an early English statute, or similar statutes in this country—

- (a) **As her dower, at common law, to one-third of all lands of which he was seised at any time during the coverture, and which her issue might have inherited.**

⁹⁵ See post, p. 131.

⁹⁶ Post, p. 138.

- (b) As her thirds, under the statute of 22 & 23 Car. II. c. 10, to one-third of his personal property, if he left children or their issue living; otherwise to one-half.

Corresponding to the husband's rights by curtesy, the surviving wife has certain rights in her husband's lands, known as dower. She is entitled, as her dower, to one-third of all lands and tenements of which her husband was seised at any time during the coverture, and which any issue which she might have had could have inherited.⁹⁷ Dower and curtesy differ in important particulars, and principally in that dower is independent of the birth of issue. But, corresponding to this essential of curtesy is the restriction that the wife can be endowed of such lands only as her issue might have inherited. Thus, where the husband is seised of lands entailed in favor of the heirs of a particular woman, the issue of a second wife could not inherit, and she has no right of dower in such lands. A further important difference between dower and curtesy is that in some states by statute dower is not restricted to the life of the wife, but is absolute, though extending to only one-third of her husband's real estate. At common law it is only a life estate. Before the death of the husband, the wife has an inchoate interest, which may ripen into dower, and any alienation by the husband will be subject to such interest,⁹⁸ unless, as she is very generally allowed by statute to do, she joins him in the conveyance for the purpose of barring her dower. In some states, by statute, on a judicial sale of a husband's real estate vesting an absolute title in the purchaser, the wife's inchoate interest vests as it would on his death.⁹⁹

Under the statute 22 & 23 Car. II. c. 10, which is the basis of the statutes of distribution in this country, and which has been closely followed in many of the states, the widow was entitled, in case of her husband dying intestate, to one-third of his personal property, after payment of his debts, in case he left children or their issue surviving, and, in default of surviving children or their issue, to one-half. In the latter case the remaining half went to the husband's next of kin, if any; otherwise to the crown.¹⁰⁰

⁹⁷ 2 Bl. Comm. 130; *Dickin v. Hamer*, 1 Drew. & S. 284.

⁹⁸ 2 Bl. Comm. 132.

⁹⁹ *Elliott v. Cale* (Ind. Sup.) 14 N. E. 708.

¹⁰⁰ 2 Bl. Comm. 515; 2 Kent, Comm. 427; *Cave v. Roberts*, 8 Sim. 214.

ESTATES BY THE ENTIRETY.

60. When land is conveyed or devised to husband and wife jointly, they take as tenants by the entirety. Each is seised of the whole, and the land goes to the survivor. This doctrine has been abolished in some states by statute.

Where land is conveyed or devised to husband and wife jointly, they take, at common law, not as joint tenants or tenants in common, but as tenants by the entirety. Neither of them has an undivided half of the land, nor any absolute inheritable interest, but each has an interest in the whole. On the death of either, the whole estate vests in the survivor. During coverture both take the same and an inseparable interest in the whole property. Neither has such a separate interest as he or she can sell, or incumber, or devise, or which his or her heirs can inherit. Neither can affect the other's rights as survivor by a separate transfer, and whatever will defeat the interest of one will defeat the interest of the other.¹⁰¹ On the death of either, the whole estate goes to the survivor.¹⁰²

¹⁰¹ *Wales v. Coffin*, 13 Allen (Mass.) 213; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175; *Wright v. Saddler*, 20 N. Y. 320; *Bertles v. Nunan*, 92 N. Y. 152; *Zorntlein v. Bram*, 100 N. Y. 12, 2 N. E. 388; *Fisher v. Provin*, 25 Mich. 347; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40; *Marburg v. Cole*, 49 Md. 402; *Bates v. Seely*, 46 Pa. St. 248; *Lux v. Hoff*, 47 Ill. 425; *Almond v. Bonnell*, 76 Ill. 536; *Davis v. Clark*, 26 Ind. 424; *McDuff v. Beauchamp*, 50 Miss. 531; *Bennett v. Child*, 19 Wis. 364; *Rogers v. Grider*, 1 Dana (Ky.) 242. "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. This species of tenancy arises from the unity of husband and wife, and it applies to an estate in fee, for life, or for years. * * * The same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety." 2 Kent, Comm. 132.

¹⁰² Cases above cited. And see *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Pierce v. Chace*, 108 Mass. 254; *French v. Mehau*, 56 Pa. St. 286; *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, Id. 371; *Allen v. Allen*, 47 Mich. 74, 10 N. W. 113. In a late Pennsylvania case, husband and wife,

In a few states the doctrine of tenancy by the entirety has not been recognized, it seems;¹⁰³ and in some states it has been abolished, or modified by statute, either expressly, or impliedly by the married women's acts, so that a conveyance to husband and wife makes them joint tenants or tenants in common; the statutes varying somewhat in the different states.¹⁰⁴ In many states, however, the doctrine still obtains.

It has been held that the wife's interest, in view of its nature, in property thus held by the entirety, cannot be regarded as her separate property, within the meaning of statutes giving married women the power to hold separate property, and convey the same, or contract with reference to it.¹⁰⁵

COMMUNITY PROPERTY.

61. In some states, by statute, property acquired by husband and wife, or by either of them, during coverture, otherwise than in certain excepted ways specified in the statute, is declared to be common property. These statutes create a kind of partnership between husband and wife in regard to property. The doctrine was adopted from the civil law, and was unknown to the common law.

who were tenants by entireties, mortgaged the land so held. After the wife's death it was sold under a judgment against the husband entered prior to the mortgage. It was held that, as the wife's estate terminated at her death, the purchaser at the execution sale took a good title as against the mortgage. *Fleek v. Zillhaver*, 117 Pa. St. 213, 12 Atl. 420.

¹⁰³ See *Sergeant v. Steinberger*, 2 Ohio, 305; *Whittlesey v. Fuller*, 11 Conn. 337.

¹⁰⁴ See *Gresham v. King*, 65 Miss. 387, 4 South. 120; *Cooper v. Cooper*, 76 Ill. 57. Some courts hold that the doctrine is impliedly abolished by the married women's acts giving them separate property rights. *Cooper v. Cooper*, supra; *Clark v. Clark*, 56 N. H. 105. But the weight of authority is to the contrary. *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824; *McDuff v. Beauchamp*, 50 Miss. 531; *Gresham v. King*, supra; *Bertles v. Nunan*, 92 N. Y. 152; *McCurdy v. Canning*, 64 Pa. St. 39; *Marburg v. Cole*, 49 Md. 402; *Fisher v. Provin*, 25 Mich. 347.

¹⁰⁵ *Speier v. Opfer*, 73 Mich. 35, 40 N. W. 909; *Curtis v. Crowe*, 74 Mich. 99, 41 N. W. 876. But see *Dreutzer v. Lawrence*, 58 Wis. 594, 17 N. W. 423.

The community property doctrine was unknown to the common law. It had its origin in the civil law. In Louisiana, Texas, California, Washington, and in a few other Western and Southwestern states the community doctrine has been adopted by statute from the French, Spanish, or Mexican law, and now prevails in those states. The general scheme of these statutes is the same, but they vary widely in details, and it is not possible to state general rules which will be applicable in all the states. The statutes and decisions must be consulted. In some states all the property acquired during coverture by either the husband or the wife, or by both, is declared to be common or community property. In others property acquired by gift, bequest, devise, or descent is excepted, and becomes the separate property of the spouse by whom it is acquired.

The central idea of the community system is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labor of either or both of them, and all property vesting in either or both of them, except in the ways expressly excepted by the statute, inures to the benefit of both of them; and, though community property has not all the incidents of partnership property, it has many of them, and is commonly called "partnership property."¹⁰⁶

The presumption of law is that property purchased during the existence of the marriage relation, whether it is purchased in the name of both spouses or in the name of one only, is community property.¹⁰⁷ But the presumption may be rebutted. When property is purchased in the wife's name she may rebut the presumption by showing that the purchase was made by investment of her paraphernal or separate property.¹⁰⁸ And in like manner the husband may show that he made a purchase with his separate funds.¹⁰⁹ In either case the proof,

¹⁰⁶ 3 Am. & Eng. Enc. Law, 350, 354. See *De Blane v. Lynch*, 23 Tex. 25; *Meyer v. Kinzer*, 12 Cal. 247; *Clark v. Norwood*, 12 La. Ann. 598; *Cooke v. Bremond*, 27 Tex. 457; *Higgins v. Johnson's Heirs*, 20 Tex. 389.

¹⁰⁷ *Meyer v. Kinzer*, 12 Cal. 247; *Love v. Robertson*, 7 Tex. 6; *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649; *Smalley v. Lawrence*, 9 Rob. (La.) 211; *Stauffer v. Morgan*, 39 La. Ann. 632, 2 South. 98; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711; *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398.

¹⁰⁸ *Stauffer v. Morgan*, *supra*.

¹⁰⁹ *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389.

to rebut the presumption, must be clear.¹¹⁰ It is not necessary to prove that property is in fact the product of the joint efforts of husband and wife to establish its character as community property. If it is acquired after the marriage by either alone, but not in a way excepted by the statute, it belongs to the community.¹¹¹ Community property is made liable for community debts. During coverture the husband has the management and control of it, and in some states he can assign or convey or incumber it without the consent of the wife. In other states, he cannot do so unless she joins him.

¹¹⁰ *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Gogreve v. Dehon*, 41 La. Ann. 244, 6 South. 31.

¹¹¹ *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711.

CHAPTER IV.

CONTRACTS, CONVEYANCES, ETC., AND QUASI-CONTRACTUAL OBLIGATIONS.

- 62. Contracts of Wife.
- 63, 64. Wife as a Sole Trader.
- 65-68. Conveyances, Sales, and Gifts by Wife.
- 69. Contracts of Husband.
- 70. Contracts of Wife as Husband's Agent.
- 71, 72. Husband's Liability for Necessaries Furnished Wife.
- 73. Husband's Liability for Wife's Funeral Expenses.
- 74. Husband's Liability for Wife's Antenuptial Debts.

CONTRACTS OF WIFE.

62. Except in the following cases, a married woman has no power or capacity to contract. Her attempted contracts are not voidable merely, but are absolutely void.

EXCEPTIONS—(a) She can contract and sue and be sued as a feme sole, even at common law, when her husband has been banished, has abjured the realm, is a nonresident alien, or has been transported.

(b) In equity, with the consent of her husband, she may carry on a separate trade or business, and contract with reference thereto.

(c) In equity she may contract with reference to her separate estate, so as to bind it, but not so as to bind herself personally.

(d) Under modern statutes, her disability to contract has been removed to a greater or less extent in the different states.

As a result of the common-law principle that the legal existence of a woman is lost during coverture, the attempted contracts of a married woman are, with few exceptions, absolutely void. She cannot,

during coverture, enter into a contract that will bind her personally, either during coverture or after her coverture has been determined by death or divorce; and the rule is the same at law and in equity.¹ In a Delaware case a married woman sold certain lands to another, both she and the purchaser erroneously believing that her husband was dead, the probability being that such was the case. After the husband's death the purchaser brought a suit in equity to compel the woman to make him a deed to the land, and to restrain her from enforcing a judgment in ejectment which she had obtained against him. It was held that he was not entitled to relief, even though the purchase was in good faith, and though he had made valuable improvements on the land. The contract, being by a married woman, it was said, was absolutely void, and a court of equity could not give validity to a contract void at law.² She cannot be rendered liable on her attempted contracts, either directly or indirectly. She cannot, therefore, be estopped to attack their validity by reason of her conduct in entering into them, or by her acts or admissions in relation to them. To hold her thus estopped would be to indirectly enforce her contracts.³

New Promise after Death of Husband or Divorce.

Since the contracts of a married woman during coverture are absolutely void, on principle they should have no effect whatever. By the weight of authority, therefore, a promise by a married woman, after her coverture has been determined either by death or divorce, to perform a promise given by her during coverture, is void for want of

¹ 2 Kent, Comm. 150; *Socket v. Wray*, 4 Brown, Ch. 483, 487; *Kenge v. Delavall*, 1 Vern. 326; *Ross v. Singleton*, 1 Del. Ch. 149; *Marshall v. Rutton*, 8 Term R. 547; *Fairhurst v. Liverpool Adelphi Loan Ass'n*, 23 Law J. Exch. 163; *Pittam v. Foster*, 1 Barn. & C. 248; *Lowell v. Daniels*, 2 Gray (Mass.) 161; *Bemis v. Call*, 10 Allen (Mass.) 512; *Pierce v. Chace*, 108 Mass. 254, 259; *Butler v. Buckingham*, 5 Day (Conn.) 492; *Kelso v. Tabor*, 52 Barb. (N. Y.) 125; *Hollis v. Francois*, 5 Tex. 195; *Norris v. Lantz*, 18 Md. 260; *Glidden v. Strupler*, 52 Pa. St. 400; *Love v. Love* (Pa. Sup.) 12 Atl. 498; *Tracy v. Keith*, 11 Allen (Mass.) 214; *Farrar v. Bessey*, 24 Vt. 89; *Rodemeyer v. Rodman*, 5 Iowa, 426; *Pond v. Carpenter*, 12 Minn. 430 (Gil. 315).

² *Ross v. Singleton*, *supra*.

³ See the cases above cited. And see *Pierce v. Chace*, 108 Mass. 254, 259; *Miles v. Lingerian*, 24 Ind. 385; *Drury v. Foster*, 2 Wall. 24; *Merriam v. Railroad Co.*, 117 Mass. 241.

consideration. In other words, she cannot, after the death of her husband or a divorce, ratify a contract entered into by her during coverture, and thereby render it binding upon her.⁴ Some of the courts have sustained such a ratification on the ground that she is under a moral obligation to perform the contract, and that this obligation is a sufficient consideration to support her promise after coverture.⁵ This, however, is directly contrary to the well-settled rule of the law of contract that a mere moral obligation is no consideration for a promise.⁶

Exceptions to the Rule at Common Law.

There were exceptions to the rule at common law in regard to contracts of married women in cases where the husband had been banished, or had abjured the realm, or was a nonresident alien, or was under sentence of transportation or of penal servitude for a term of years or for life. In these cases he was regarded as civilly dead, and the wife had the power to contract, and could sue and be sued, as a feme sole.⁷ These doctrines have been adopted with some modifications in this country.⁸ It has been very generally held that a married woman has power to contract, and to sue and be sued in relation to her contracts, where her husband has abandoned her and the country; and residence in another state, with intention to abandon her, has been regarded as equivalent to residence in a foreign country.⁹

⁴ Meyer v. Haworth, 8 Adol. & El. 467; Loyd v. Lee, 1 Strange, 94; Lennox v. Eldred, 1 Thomp. & C. 140; Hayward v. Barker, 52 Vt. 429; Hubbard v. Bugbee, 58 Vt. 172, 2 Atl. 594; Putnam v. Tennyson, 50 Ind. 456; Candy v. Coppock, 85 Ind. 594; Porterfield v. Butler, 47 Miss. 165; Clark, Cont. 203, and cases there cited.

⁵ Lee v. Muggeridge, 5 Taunt. 36; Brown v. Bennett, 75 Pa. St. 420; Sharpless' Appeal, 140 Pa. St. 63, 21 Atl. 239; Goulding v. Davidson, 26 N. Y. 604; Hubbard v. Bugbee, 55 Vt. 506.

⁶ Clark, Cont. 180, 203.

⁷ 1 Bl. Comm. 443; 2 Kent, Comm. 154 (where the question is considered at length, and the English cases are collected and discussed); Carrol v. Blencow, 4 Esp. 27; Belknap v. Lady Weyland, Co. Litt. 132b, 133a; Derry v. Duchess of Mazarine, 1 Ld. Raym. 147.

⁸ Gregory v. Paul, 15 Mass. 31; Rhea v. Rhenner, 1 Pet. 105; Robinson v. Reynolds, 1 Aik. (Vt.) 174; and cases hereafter cited.

⁹ Gregory v. Paul, 15 Mass. 31; Abbot v. Bayley, 6 Pick. (Mass.) 89; Osborn v. Nelson, 59 Barb. (N. Y.) 375; Rhea v. Rhenner, 1 Pet. 105; Arthur v. Broadnax, 3 Ala. 557; Krebs v. O'Grady, 23 Ala. 727; Smith v. Silence, 4

The rule has even been applied in cases where the husband has abandoned his wife, without leaving the state.¹⁰ To give rise to the exception, the husband must have renounced all his marital rights and relations.¹¹

Exceptions in Equity and under Modern Statutes.

Courts of equity recognize certain exceptions to the rule that a married woman cannot enter into a contract; and, further than this, the common-law doctrine has been greatly modified by modern statutes.

In equity, as will be seen in a subsequent section, a wife may, with the consent of her husband, carry on business as a sole trader, and may contract with reference to her separate trade or business.¹²

As was stated in a preceding chapter, in equity a married woman may acquire and hold an estate to her sole and separate use. In relation to this estate, she may to some extent make contracts which a court of equity will enforce against the separate property. She cannot, however, even in equity, much less at law, make a contract in relation to such separate estate which will be binding upon her personally. The extent to which a married woman may contract so as to bind her equitable separate estate will be shown at some length in a subsequent chapter.¹³

In late years the legislatures of the different states have enacted laws removing to a greater or less extent the common-law disability of a married woman to contract. In some states the disability has been wholly removed, so that she can now contract and sue and be sued as a feme sole. In other states the disability has only been partially removed, and she can contract only to a limited extent. In all the states statutes have been enacted allowing a married woman to acquire and hold property as her separate estate, and under these statutes she has a more or less general power to contract in relation

Iowa, 321; *Rose v. Bates*, 12 Mo. 30; *Rosenthal v. Mayhugh*, 33 Ohio St. 153; *Starrett v. Wynn*, 17 Serg. & R. (Pa.) 130; *Bean v. Morgan*, 4 McCord (S. C.) 148.

¹⁰ *Love v. Moynehan*, 16 Ill. 277.

¹¹ *Ayer v. Warren*, 47 Me. 217; *Gregory v. Pierce*, 4 Metc. (Mass.) 478; *Beckman v. Stanley*, 8 Nev. 257.

¹² Post, p. 111.

¹³ Post, p. 135.

to her separate estate. The effect of these statutes will be considered in a separate chapter.¹⁴

WIFE AS A SOLE TRADER.

63. In equity, by agreement with her husband, a wife may carry on a separate trade or business, and contract with reference thereto, and the stock in trade and profits will be treated as her separate property

(a) As against the husband, though the agreement was voluntary.

(b) As against the husband's creditors, if the agreement was based on a valuable consideration.

64. The husband will be liable for the debts of his wife's separate business, when it is conducted with his express consent, or where his consent may be implied; as where he takes part in its management, or shares in its profits. But he is not liable if it is conducted without his consent, express or implied.

While at common law a wife could make no contracts, and her husband was entitled to her separate earnings, she was nevertheless, by the aid of equity, enabled to carry on a separate trade or business. When a husband has agreed with his wife that she may carry on a separate trade for her own use and benefit, equity will protect the wife's interests, and treat the husband, when no trustees have been appointed, as trustee for the wife as to her stock in trade and the profits of the business.¹⁵ Where the agreement is supported by a valuable consideration, it will be supported in favor of the wife even against her husband's creditors.¹⁶ If the agreement is entered into

¹⁴ Post, p. 143.

¹⁵ Macq. Husb. & W. 328; Story, Eq. Jur. § 1387; Ashworth v. Outram, 5 Ch. Div. 923; Partridge v. Stocker, 36 Vt. 108; James v. Taylor, 43 Barb. 530; Penn v. Whitehead, 17 Grat. (Va.) 503. By the "custom of London," a wife could trade as a feme sole. 2 Roper, Husb. & W. 124.

¹⁶ Story, Eq. Jur. §§ 1385-1387; 2 Roper, Husb. & W. 171; Penn v. Whitehead, 17 Grat. (Va.) 503.

before marriage, and in consideration thereof, the marriage is a valuable consideration. If it is not entered into until after marriage, there must be some other consideration. The husband's agreement may be either in express words or may be established from his acquiescence in his wife's acts.¹⁷ He may, however, withdraw his consent at any time, unless supported by a valuable consideration, and assert his common-law rights.¹⁸ Where, under such agreement, the property is vested in a trustee, it will be supported in law as well as in equity.¹⁹

While the wife may conduct a separate business under an agreement with her husband which would be supported in equity as against her husband, nevertheless the debts incurred in such business, although contracted in the name of the wife, are his debts, and he is liable for them;²⁰ and where there is no agreement, if he participates in the benefits of the business,²¹ or assists her in the management of it, he thereby ratifies her authority to incur debts, and renders himself liable for them.²² But when he has no connection with the business, and there is no evidence that he ever assented to it, he is not liable for debts contracted by the wife in its management.²³

The wife's right to conduct a separate business is generally confirmed and regulated by statute in the various states. When a married woman is by statute authorized to carry on trade and perform labor or services on her sole and separate account, she has been held personally liable on a note given for property purchased for business purposes; the court saying: "The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. * * * The power to engage in business

¹⁷ *Ashworth v. Outram*, 5 Ch. Div. 923; *Partridge v. Stocker*, 36 Vt. 108; *Tillman v. Shackleton*, 15 Mich. 447; *Jones v. Woche*r, 90 Ky. 230, 13 S. W. 911.

¹⁸ *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Conkling v. Dou*l, 67 Ill. 355.

¹⁹ *Story*, Eq. Jur. §§ 1385, 1386.

²⁰ *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Lovett v. Robinson*, 7 How Prac. (N. Y.) 105.

²¹ *Macq. Husb. & W.* 333; *Petty v. Anderson*, 3 Bing. 170.

²² *Curtis v. Engel*, 2 Sandf. Ch. (N. Y.) 287.

²³ 2 *Reper*, Husb. & W. c. 18, § 4; *Tuttle v. Hoag*, 46 Mo. 38; *Jenkins v. F*linn, 37 Ind. 349.

would be a barren and useless one disconnected with the right to conduct it in the way and by the means usually employed.”²⁴

CONVEYANCES, SALES, AND GIFTS BY WIFE.

- 65. AT COMMON LAW**—At common law, a married woman could not, by a conveyance, either transfer her own real property, or bar her right of dower in the real property of her husband.²⁵
- 66. IN EQUITY**—In equity, in most jurisdictions, it is held that a married woman has the power to convey or otherwise dispose of her equitable separate estate, real or personal, unless prohibited by the instrument creating it. In all jurisdictions she has the power if conferred by the instrument creating it.
- 67. BY STATUTE**—Under modern statutes married women generally have the power to dispose of their separate property, real or personal.
- 68. Statutes have very generally given them the power to convey their own real estate, and to bar their right to dower in the real estate of their husbands by joining with them in conveyances. Certain formalities in the execution of the conveyance are required, and these must be strictly observed.**

Neither a conveyance of land, nor a sale and transfer of personal property, without covenants or warranties, nor a gift, is a contract, for, while there is an agreement, the agreement transfers rights in rem only, without contemplating, or even for a moment creating, a

²⁴ *Frecking v. Rolland*, 53 N. Y. 422; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. 351; *Bodine v. Killeen*, 53 N. Y. 93.

²⁵ Since a wife's personal property in possession vested in her husband at common law, no question as to her power to transfer it could well arise. So, as to her choses in action, she could not assign them so as to defeat his right to reduce them to his possession.

right in personam.²⁶ Conveyances and transfers must, therefore, be dealt with separately from contracts, and not as contracts.

At Common Law.

At common law a married woman could not, either by her own conveyance or by uniting with her husband in a conveyance, bar herself or her heirs of any estate of which she was seised in her own right, or of her right of dower in the real estate of her husband.²⁷ A conveyance of her land by a married woman was absolutely void as to her. A conveyance by her jointly with her husband, whether of her own or of her husband's land, was considered as the act of the husband only, and the law restrained its operation to the husband's interest, just as if he alone had executed it. "This disability is supposed to be founded in the principle that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that, from the nature of the connection, there is danger that the influence of the husband may be improperly exerted for the purpose of forcing the wife to part with her rights in his favor."²⁸ The only mode in which a feme covert could convey her real estate at common law was by uniting with her husband in levying a fine, which was a solemn proceeding of record, in the face of the court, in which the judges were supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her joining in the act was voluntary.²⁹ Such was the doctrine of the common law.

In Equity.

A court of equity has no more power than a court of law to recognize a conveyance by a married woman as binding upon her, unless it conveys her equitable separate estate. In the latter case the conveyance may be upheld. The doctrine of the wife's equitable separate estate will be fully considered in a separate chapter. It is sufficient to say here that in most jurisdictions it is held that a married woman has, as an incident to her separate estate, the power to dis-

²⁶ Anson, Cont. p. 3; Clark, Cont. p. 12.

²⁷ Martin v. Dwelly, 6 Wend. (N. Y.) 9; Hollingsworth v. McDonald, 2 Har. & J. (Md.) 230.

²⁸ Per Sutherland, J., in Martin v. Dwelly, supra.

²⁹ 2 Inst. 515; 1 Vent. 121a; Martin v. Dwelly, supra.

pose of it by conveyance or otherwise, even though this power is not expressly conferred by the instrument creating the estate, provided it is not expressly excluded by the instrument. In some jurisdictions it is held that the power must be conferred in the creation of the estate. In none does the power exist if excluded in the creation of the estate.³⁰

Under Modern Statutes.

In all of the states the common-law rules prohibiting conveyances by a married woman, and those giving her personal property to her husband, have been greatly modified by statute. In some states she now has almost as much power as a feme sole in respect to her real and personal property. In all states she has more or less power to dispose of it. The extent of this power will be shown in a subsequent chapter.³¹

Mode of Conveyance Where the Power Exists.

Assuming that she has the power to make a conveyance, the question next arises as to the mode in which she must exercise it. In all of the states statutes have been enacted changing the common law in so far as it prevented a married woman from making a valid conveyance, and allowing her to convey her own real estate, or to bar her right of dower in her husband's real estate by uniting with him in a conveyance thereof. These statutes, while they vary to some extent in the different states, very generally require the wife to acknowledge the conveyance with certain formalities, separate and apart from her husband. In this, as in all other respects, the directions of the statute must be strictly complied with, or the conveyance will be ineffectual as against the wife. A deed not acknowledged by the wife according to the directions of the statute is, as to her, absolutely void, and will not even be enforced against her in equity as an agreement to convey.³²

³⁰ Post, p. 135.

³¹ Post, p. 143.

³² *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; *Butler v. Buckingham*, 5 Day (Conn.) 492; *Grove v. Todd*, 41 Md. 633; *Hollingsworth v. McDonald*, 2 Har. & J. (Md.) 230; *Townsley v. Chapin*, 12 Allen (Mass.) 476; *Bressler v. Kent*, 61 Ill. 426; *Rust v. Goff*, 94 Mo. 511, 7 S. W. 418; *Laidley v. Central Land Co.*, 30 W. Va. 505, 4 S. E. 705. Immaterial departures from the statutory

CONTRACTS OF HUSBAND.

69. A man's power to contract is not affected by his marriage, except that he cannot by his contract deprive the wife of rights which she acquires in his property by virtue of the marriage.

It is the legal existence of the woman only that is affected by marriage. The man's legal capacity remains virtually unimpaired. He has substantially the same power to enter into contracts as before marriage. The only restrictions on his power to contract which are imposed by marriage result, not from any incapacity in himself, but from the fact that by law the marriage confers upon the wife, as has been seen, certain rights in her husband's property. He cannot defeat these rights by any contract entered into by himself alone. Thus he cannot, by a sale of his land, defeat her right to dower therein if she survives him.

CONTRACTS BY WIFE AS HUSBAND'S AGENT.

70. The wife may, when expressly or impliedly authorized by the husband, act as his agent in the making of contracts for him; and she may become his agent by estoppel or by ratification, as in other cases of agency.

The rule of the common law is so far modified as to enable a wife to enter into a contract as the agent of her husband when he has given her express authority to bind him, or has impliedly held her out as having such authority.⁸³ Her agency is, like that of any other agent, a question of fact, and may be inferred from the ostensible authority with which the husband has clothed her.⁸⁴ The wife is

formalities will not avoid her conveyance. *Homer v. Schonfeld*, 84 Ala. 313, 4 South. 105; *Hollingsworth v. McDonald*, *supra*.

⁸³ Add. Cont. 135.

⁸⁴ *McGeorge v. Egan*, 7 Scott, 112; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77; *Cox v. Hoffman*, 4 Dev. & B. (N. C.) 180; *Gray v. Otis*, 11 Vt. 628.

the general agent of the husband with reference to those matters which are usually under the control of the wife, such as the purchase of groceries and provisions for the family, and the engaging of household servants.³⁵ The rules governing the wife's agency in these matters are somewhat peculiar, and their consideration will therefore be reserved for a separate section.

Agency by Estoppel.

It will presently be seen that marriage and cohabitation do not, as a matter of law, regardless of the facts, imply authority in the wife to pledge her husband's credit, even for necessities, unless he neglects to support her. The husband may, however, so act as to estop himself from denying his wife's agency. If she is generally allowed to deal with a tradesman, the husband will be considered to have held her out as his agent, and will be liable for her purchases. This doctrine is not limited to purchases of necessities by the wife. The extent of the estoppel will depend upon the extent of the dealings which the husband has thus authorized.³⁶ "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demurrer in respect to such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."³⁷

Agency by Ratification.

The husband may, under the doctrine of agency by ratification, become liable on contracts made by his wife as his agent, by ratifying them. If, for instance, he ratifies a purchase made by his wife on his credit, he is just as liable as if he had previously authorized her to pledge his credit. And this necessarily applies not only where the contract was for the purchase of necessities for the house-

³⁵ *Freestone v. Butcher*, 9 Car. & P. 643; *Ruddock v. Marsh*, 1 Hurl. & N. 601; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308.

³⁶ *Debenham v. Mellon*, 6 App. Cas. 24, 5 Q. B. Div. 403; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Benjamin v. Benjamin*, 15 Conn. 347; *Gates v. Brower*, 9 N. Y. 205; *Keller v. Phillips*, 39 N. Y. 351; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663.

³⁷ *Debenham v. Mellon*, *supra*.

hold, but extends to other contracts as well.³⁸ Knowledge that his wife has purchased goods, and failure to disapprove of the purchase, is a ratification.³⁹ He cannot repudiate a purchase by the wife, and at the same time retain the property purchased; but must return it if it is in existence.⁴⁰

HUSBAND'S LIABILITY FOR NECESSARIES FURNISHED WIFE.

71. AGENCY IN FACT—The husband's liability for necessities purchased by his wife on his credit, where his wife is supported by him, depends upon the existence of agency in fact:

- (a) If they are living together, the fact of cohabitation raises a presumption of authority in fact; but this presumption may be rebutted.
- (b) If they are living apart, the presumption is against her authority to bind him, and the burden is on the person dealing with her to show such authority.

72. AGENCY OF NECESSITY—As a rule, where a husband fails to provide for his wife, she becomes his agent of necessity to purchase necessities on his credit. But the rule is subject to qualification:

- (a) He is liable, under such circumstances,
 - (1) Where he lives with his wife.
 - (2) Where they live apart, either through his fault or by agreement, and without fault on her part.
- (b) He is not liable
 - (1) Where she leaves him without cause, unless she offers to return, and he refuses to receive her.

³⁸ *Conrad v. Abbott*, 132 Mass. 330; *Day v. Burnham*, 36 Vt. 37; *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72.

³⁹ *Seaton v. Benedict*, 5 Bing. 28; *Lane v. Ironmonger*, 13 Mees. & W. 368; *Cothran v. Lee*, 24 Ala. 380; *Woodward v. Barnes*, 43 Vt. 330; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160.

⁴⁰ *Gilman v. Andrus*, 28 Vt. 241.

- (2) Where the credit is given to her, and not to him.
- (3) Where she has a sufficient separate income.
- (4) Where she has agreed to accept a certain amount from him, and he pays it.

The most important class of cases in which the wife may render her husband liable on the theory of agency are cases in which she purchases necessities, and pledges his credit therefor. In these cases the power of the wife and the liability of the husband will vary according to the circumstances. Where he supports her, she has no power to pledge his credit, even for necessities, unless there is authority in fact. If he fails to support her, she has the absolute right to pledge his credit for necessities, whether she has authority in fact or not. The law, as applied to cases in which the wife is supported by the husband, will first be explained, and then cases in which he neglects to provide for her will be considered. Finally we shall ascertain what things are to be regarded as necessities.

Where the Wife is Supported by the Husband—Agency in Fact.

The husband's liability for necessities furnished his wife, where he supports her, rests entirely upon the theory of agency in fact. He is liable if he has expressly or impliedly authorized her to purchase on his credit; but he is not liable if he has not done so. The principal question in these cases is as to the presumption of authority. In other respects, the law is the same as in the case of any other contract entered into by the wife as agent of her husband. His liability depends entirely on the existence of authority in fact on her part to bind him.⁴¹

Same—Where They are Living Together.

Where the husband and wife are living together, a presumption arises, from the fact of cohabitation, that the husband has in fact given the wife authority to purchase necessities on his credit. In other words, where a tradesman brings an action against the hus-

⁴¹ Jolly v. Rees, 15 C. B. (N. S.) 628; Johnston v. Sumner, 3 Hurl. & N. 261; Keller v. Phillips, 39 N. Y. 351; Benjamin v. Benjamin, 15 Conn. 347; Debenham v. Mellon, 6 App. Cas. 24, 5 Q. B. Div. 403.

band for articles furnished the wife on the husband's credit, he makes out a *prima facie* case by showing that the wife was living with her husband, and that the articles were in kind, quality, and quantity suitable to the husband's fortune and station in life.⁴² This presumption, however, as already stated, is one of fact, and not of law. Cohabitation does not necessarily, but only *prima facie*, empower the wife to render her husband liable, even for necessities. He may rebut this presumption by showing that she was forbidden to pledge his credit.⁴³ And, since his liability, where he suitably maintains her, is based on the theory of an agency in fact, the tradesman's ignorance of the fact that the wife had been forbidden to pledge his credit is altogether immaterial, provided, of course, as heretofore explained, the husband has not so held out his wife as authorized to pledge his credit as to be estopped to deny her agency.⁴⁴ It is contended, it was said in a leading English case, "that there is a presumption that a wife living with her husband is authorized to pledge her husband's credit for necessities; that the goods supplied by the plaintiffs were, as it is admitted they were, necessities; and that, as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term 'presumption' in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessities. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessities upon her husband's credit, and suing him, makes out a *prima facie* case against him upon proof of that fact and of the cohabitation. But this is a mere presumption of fact, founded

⁴² *Debenham v. Mellon*, 6 App. Cas. 24, 5 Q. B. Div. 403; *Woodward v. Barnes*, 43 Vt. 330; *Keller v. Phillips*, 39 N. Y. 351; *Alley v. Winn*, 134 Mass. 77.

⁴³ *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Debenham v. Mellon*, 6 App. Cas. 24, 5 Q. B. Div. 403; *Woodward v. Barnes*, 43 Vt. 330; *Keller v. Phillips*, 39 N. Y. 351.

⁴⁴ *Ante*, p. 116. As was pointed out in *Debenham v. Mellon*, *supra*, the statement in *Johnson v. Sumner*, 27 Law J. Exch. 341, that, "if a man and his wife live together, it matters not what private arrangement they make, the wife has all the usual authorities of wife," applied only to the case where an appearance of authority has been created by the husband's acts, or by his assent to the acts of his wife.

upon the supposition that wives cohabitating with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husband's credit in respect of matters coming within those departments. Such a presumption or *prima facie* case is rebuttable, and is rebutted when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency, upon which, *ex hypothesi*, the liability of the husband is founded, would be practically of no effect."⁴⁵

Same—Where They are Living Apart.

Where a wife is living apart from her husband, there is no presumption that she has any authority in fact to pledge his credit even for necessities. On the contrary, the presumption is that she has not. The person who sells to her under such circumstances either sells to her as a *feme sole*, or, if he knows that she is married, he is given reason to suspect, from the fact of her living apart from her husband, that her relations with him are such that she has not been authorized to pledge his credit. Under these circumstances it is incumbent upon the tradesman, in order to hold the husband liable, to rebut the presumption by showing authority in fact, or else to bring the case within the rules to be presently explained, giving a wife absolute power to bind her husband where he neglects to provide for her.⁴⁶

Where the Husband Neglects to Support the Wife—Agency of Necessity.

Where a husband neglects to provide for or support his wife, even if they are cohabiting, the wife has an absolute right to pledge his credit for necessities. She has this right even though there is no agency in fact, for the agency is implied in law without regard to the fact.⁴⁷ The husband's liability is based on the theory of

⁴⁵ Per Thesiger, L. J., in *Debenham v. Mellon*, *supra*.

⁴⁶ *Johnson v. Sumner*, 27 Law J. Exch. 341; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83; *Mitchell v. Treanor*, 11 Ga. 324; *Rea v. Durkee*, 25 Ill. 414; *Stevens v. Story*, 43 Vt. 327; *Sturtevant v. Starin*, 19 Wis. 268; *Benjamin v. Dockham*, 132 Mass. 181; *Inhabitants of Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *Hartmann v. Tegart*, 12 Kan. 177; *Vusler v. Cox*, 53 N. J. Law, 516, 22 Atl. 347.

⁴⁷ *Eastland v. Burchell*, 3 Q. B. Div. 436; *Seybold v. Morgan*, 43 Ill. App. 39; *Pierpont v. Wilson*, 49 Conn. 450; *Dexter v. Booth*, 2 Allen (Mass.) 559;

agency, but the agency is implied as a matter of law because of the husband's legal duty to support his wife. The husband will not be liable for necessities purchased by his wife if he shows that credit was given to the wife herself,⁴⁸ or that she had a sufficient separate income,⁴⁹ or that he made her a sufficient allowance.⁵⁰

The rule applies all the more forcibly, if possible, where the husband unlawfully separates from his wife without making suitable provision for her, or if he, by his conduct, causes her to leave him.⁵¹ A husband is bound to support his wife, and if he leaves her without the means of subsistence she becomes "an agent of necessity to supply her wants upon his credit."⁵² This right arises where the husband has driven the wife away, or where she has left him in consequence of ill treatment and reasonable and well-grounded apprehension of further violence,⁵³ or because her husband has rendered his home an unfit place for her to live, as by introducing women of profligate habits,⁵⁴ or in consequence of the commission by him of such acts as would entitle her to a divorce

Raynes v. Bennett, 114 Mass. 424; Benjamin v. Dockham, 134 Mass. 418; Watkins v. De Armond, 89 Ind. 553; Eiler v. Crull, 99 Ind. 375; Walker v. Loughton, 11 Fost. (N. H.) 111; Ferren v. Moore, 59 N. H. 106; Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Woodward v. Barnes, 43 Vt. 330; Barr v. Armstrong, 56 Mo. 577; Eames v. Sweetser, 101 Mass. 78; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77; Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515.

⁴⁸ *Jewsbury v. Newbold*, 26 Law J. Exch. 247; *Pearson v. Darrington*, 32 Ala. 227; *Stammers v. Macomb*, 2 Wend. (N. Y.) 454; *Moses v. Fogartie*, 2 Hill (S. C.) 335; *Carter v. Howard*, 39 Vt. 106; *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692.

⁴⁹ *Freestone v. Butcher*, 9 Car. & P. 643; *Swett v. Penrice*, 24 Miss. 416; *Weisker v. Lowenthal*, 31 Md. 413.

⁵⁰ *Atkyns v. Pearce*, 26 Law J. C. P. 252; *Harshaw v. Merryman*, 18 Mo. 106.

⁵¹ 2 Kent, Comm. 146; *Bolton v. Prentice*, 2 Strange, 1214; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Eiler v. Crull*, 99 Ind. 375; *Snover v. Blair*, 25 N. J. Law, 94; *Walker v. Loughton*, 11 Fost. (N. H.) 111. As to the effect of an offer to return, see note 56, *infra*.

⁵² *Eastland v. Burchell*, 3 Q. B. Div. 436.

⁵³ *Houliston v. Smyth*, 2 Car. & P. 22; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78.

⁵⁴ *Houliston v. Smyth*, *supra*; *Descelles v. Kadmus*, 8 Iowa, 51; *Kemp v. Downham*, 5 Har. (Del.) 417.

from bed and board.⁵⁵ If the wife leaves her husband without justifiable cause, she forfeits the right to obtain her necessities at his expense.⁵⁶ In case she returns, and is received by her husband, the right revives, but only as to future necessities.⁵⁷ This is true where she offers to return, and he refuses to receive her.⁵⁸ It follows from this doctrine that, where a wife elopes, and commits adultery, she loses the right to pledge her husband's credit for necessities;⁵⁹ and this has been held to be true even where the husband committed adultery first, and turned her away.⁶⁰ Where, however, he has connived at her adultery, it is no defense as against

⁵⁵ *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Rea v. Durkee*, 25 Ill. 503; *Barker v. Dayton*, 28 Wis. 367, 383; *Thorpe v. Shapleigh*, 67 Me. 235.

⁵⁶ *Manby v. Scott*, 1 Mod. 124; *Etherington v. Parrott*, 2 Ld. Raym. 1006; *Bever v. Galloway*, 71 Ill. 517; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281; *Hartmann v. Tegart*, 12 Kan. 177; *Collins v. Mitchell*, 5 Har. (Del.) 369; *Oinson v. Heritage*, 45 Ind. 73; *Thorne v. Kathan*, 51 Vt. 520; *Belknap v. Stewart*, 38 Neb. 304, 56 N. W. 881; *Walker v. Loughton*, 11 Fost. (N. H.) 111. "The husband who has causelessly deserted his wife may in good faith seek a reconciliation, and if the wife, under such circumstances, refuses to live with him again, without good cause, she becomes from that time the party in the wrong, and has no longer any authority to pledge his credit, even for necessities, more than she would have had if she had herself originally left him without cause." *Walker v. Loughton*, *supra*. See *Child v. Hardyman*, 2 Strange, 875. "And it makes no difference that he desires her to change her residence, and to go to live with him at some other place, not unsuitable for her residence, since he has the right to choose his own residence, and it is the duty of the wife and children to conform to his wishes in this respect." *Walker v. Loughton*, *supra*; *Rumney v. Keyes*, 7 N. H. 571; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33.

⁵⁷ *Oinson v. Heritage*, 45 Ind. 73; *Williams v. Prince*, 3 Strob. (S. C.) 490; *Reese v. Chilton*, 26 Mo. 598. There is authority to the effect that the husband will also be liable for debts contracted during separation. *Robison v. Gosnold*, 6 Mod. 171.

⁵⁸ *Manby v. Scott*, 1 Mod. 124, 131; *McGahay v. Williams*, 12 Johns. (N. Y.) 293; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247; *Henderson v. Stringer*, 2 Dana (Ky.) 291; *Clement v. Mattison*, 3 Rich. Law (S. C.) 93.

⁵⁹ *Ham v. Toovey*, Selw. N. P. 271; *Morris v. Martin*, 1 Strange, 647; *Emmett v. Norton*, 8 Car. & P. 506; *Hardie v. Grant*, *Id.* 512; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519.

⁶⁰ *Govier v. Hancock*, 6 Term R. 603. But see *Needham v. Bremner*, L. R. 1 C. P. 583.

his liability.⁶¹ One living in adultery with a wife who has left her husband, even for justifiable reasons, cannot make the husband liable for necessities furnished by him.⁶²

Where husband and wife live apart by mutual agreement, the husband's liability for necessities furnished her continues in the absence of any provision for her support.⁶³ It also continues where he has agreed to make her an allowance, if he does not pay it.⁶⁴ When, however, he furnishes her a sufficient allowance, she cannot bind him;⁶⁵ and the fact that the person who furnishes her with goods has no knowledge of the allowance is altogether immaterial, for in supplying her he acts at his peril.⁶⁶ The allowance must be sufficient for the wife's necessities, and whether it is so or not is a question of fact for the jury,⁶⁷ except where she agrees to accept a stipulated allowance, and not to apply to her husband for more. In that case the question of the sufficiency of the allowance is not for the jury, since it is excluded by the express terms of the settlement.⁶⁸

⁶¹ *Norton v. Fazan*, 1 Bos. & P. 226; *Wilson v. Glossop*, 19 Q. B. Div. 379; *Ferren v. Moore*, 59 N. H. 106.

⁶² *Almy v. Wilcox*, 110 Mass. 443.

⁶³ *Hodgkinson v. Fletcher*, 4 Camp. 70; *Ross v. Ross*, 69 Ill. 569; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Walker v. Loughton*, 11 Fost. (N. H.) 111; *Dixon v. Hurrell*, 8 Car. & P. 717; *Fredd v. Eves*, 4 Har. (Del.) 385; *Inhabitants of Alna v. Plummer*, 4 Greenl. (Me.) 258.

⁶⁴ *Beale v. Arabin*, 36 Law T. (N. S.) 249; *Nurse v. Craig*, 2 Bos. & P. (N. R.) 148.

⁶⁵ *Todd v. Stoakes*, 1 Salk. 116; *Dixon v. Hurrell*, 8 Car. & P. 717; *Mizen v. Pick*, 3 Mees. & W. 481; *Kemp v. Downham*, 5 Har. (Del.) 417; *Baker v. Barney*, 8 Johns. (N. Y.) 57; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33.

⁶⁶ *Mizen v. Pick*, *supra*; *Baker v. Barney*, *supra*; *Kemp v. Downham*, *supra*.

⁶⁷ *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emmett v. Norton*, 8 Car. & P. 506; *Pearson v. Darrington*, 32 Ala. 227.

⁶⁸ *Eastland v. Burchell*, 3 Q. B. Div. 432. In this case it was said: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound

Where the husband and wife are living apart, the husband cannot, any more than when they are living together,⁶⁹ deprive his wife of the right to pledge his credit, where he neglects to make suitable provision for her, by giving notice that he will not be responsible for her necessities.⁷⁰ As has already been stated, a husband is not liable for necessities furnished his wife where credit was given to her, and not to him,⁷¹ nor where she has a separate and sufficient income.⁷²

What are Necessaries for the Wife.

The necessities for which a wife may pledge her husband's credit under the rules which have just been explained are those things which are essential to her health and comfort, according to the rank and fortune of her husband. Necessaries, as applied to a wife, are not confined to those articles of food and clothing which are required to sustain life and preserve decency, but include such articles of utility as are suitable to maintain her according to the estate and degree

to maintain her elsewhere, and if he makes no adequate provision for this purpose she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation these terms are binding upon both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement." And see *Johnson v. Sumner*, 27 Law J. Exch. 341; *Alley v. Winn*, 134 Mass. 77.

⁶⁹ Ante, p. 119.

⁷⁰ *Harris v. Morris*, 4 Esp. 41; *Bolton v. Prentice*, 2 Strange, 1214; *Pierpont v. Wilson*, 49 Conn. 450; *Black v. Bryan*, 18 Tex. 453; *Watkins v. De Armond*, 89 Ind. 553.

⁷¹ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692; *Jewsbury v. Newbold*, 26 Law J. Exch. 247; *Pearson v. Darrington*, 32 Ala. 227; *Stammers v. Macomb*, 2 Wend. (N. Y.) 454; *Moses v. Fogartie*, 2 Hill (S. C.) 335; *Carter v. Howard*, 39 Vt. 106.

⁷² *Freestone v. Butcher*, 9 Car. & P. 643; *Swett v. Penrice*, 24 Miss. 416; *Weisker v. Lowenthal*, 31 Md. 413.

of her husband.⁷³ Wearing apparel,⁷⁴ medical attendance,⁷⁵ reasonable dentistry,⁷⁶ household supplies,⁷⁷ furniture,⁷⁸ a gold watch and certain jewelry,⁷⁹ have been held to be necessities. Legal expenses incident to a suit for restitution of conjugal rights,⁸⁰ or incident to a suit for divorce, where there is reasonable cause for instituting suit,⁸¹ have also been held to be necessities. By the weight of authority in this country, however, legal expenses in suits for divorce are not necessities.⁸² As was said by the Connecticut court: "The duty of providing necessities for the wife is strictly marital, and is imposed by the common law in reference only to a state of coverture, and not of divorce. By that law a valid contract of marriage was and is indissoluble, and therefore by it the husband could never have been placed under obligation to provide for the expenses of its dissolution."⁸³ Legal services rendered in successfully defending a married woman against a criminal prosecution are clearly necessities.⁸⁴

Money is not to be regarded as necessities. "At law it is entirely clear that a married woman has no right to borrow money on her

⁷³ *Raynes v. Bennett*, 114 Mass. 424.

⁷⁴ *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72.

⁷⁵ *Harris v. Lee*, 1 P. Wms. 482; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Cothran v. Lee*, 24 Ala. 380; *Webber v. Spannhake*, 2 Redf. Sur. (N. Y.) 258.

⁷⁶ *Freeman v. Holmes*, 62 Ga. 556; *Gilman v. Andrus*, 28 Vt. 241.

⁷⁷ *Hall v. Weir*, 1 Allen (Mass.) 261.

⁷⁸ *Hunt v. De Blaquiére*, 5 Bing. 550.

⁷⁹ *Raynes v. Bennett*, *supra*.

⁸⁰ *Wilson v. Ford*, L. R. 3 Exch. 63.

⁸¹ *Brown v. Ackroyd*, 25 Law J. Q. B. 193; *Ottaway v. Hamilton*, 3 C. P. Div. 393; *Porter v. Briggs*, 38 Iowa, 166. In the latter case it was held that it must be shown that the services were necessary for the protection of the wife's person, liberty, or reputation, distinguishing *Johnson v. Williams*, 3 G. Greene (Iowa) 97, where legal services in divorce proceedings were held not to be necessities.

⁸² *Pearson v. Darrington*, 32 Ala. 227; *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22; *Morrison v. Holt*, 42 N. H. 478; *Johnson v. Williams*, 3 G. Greene (Iowa) 97; *Wing v. Hurlburt*, 15 Vt. 607; *Dorsey v. Goodenow*, 1 Wright (Ohio) 120; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Dow v. Eyster*, 79 Ill. 254; *Shelton v. Pendleton*, 18 Conn. 423; *Coffin v. Dunham*, 8 Cush. (Mass.) 404.

⁸³ *Shelton v. Pendleton*, *supra*.

⁸⁴ *Conant v. Burnham*, 133 Mass. 503. And see dictum in *Porter v. Briggs*, 38 Iowa, 166.

husband's credit, even for the purchase of necessities."⁸⁵ There are a number of cases which hold that where a person has lent money to a wife deserted by her husband for the purchase of necessities (even, it seems, where the loan is to the wife, and not on the husband's credit), and the money has been so used, he can recover it from the husband in equity.⁸⁶ This doctrine, however, is not clear on principle; and it has lately been expressly repudiated in Massachusetts, on the ground that there is no principle upon which it can be sustained.⁸⁷ As far as precedent is concerned, the rule is amply sustained, but the reasoning of the Massachusetts court in the case referred to renders it very doubtful.

HUSBAND'S LIABILITY FOR WIFE'S FUNERAL EXPENSES.

73. It is the husband's duty to give his wife burial, and where he neglects it, he will be liable for the necessary funeral expenses to any one who pays them.

Analogous to the husband's liability for necessities purchased by his wife on his credit, where he neglects to provide for her, is the liability imposed upon him by law to pay her necessary funeral expenses. The common law imposes upon the husband the duty of giving his wife a proper burial; and if he neglects to perform this duty, and some other person performs it, and pays the necessary funeral expenses, he may recover the money paid from the husband, by an action quasi ex contractu, as for money paid to the use of the husband; or if he furnishes the coffin and other things necessary for the burial, he may recover their value.⁸⁸ In the case of necessities purchased by the wife on the credit of

⁸⁵ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692.

⁸⁶ *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfield*, Id. 559; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De Gex, F. & J. 43; *Kenyon v. Farris*, 47 Conn. 510; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83; *Leuppie v. Osborn's Ex'rs*, 52 N. J. Eq. 637, 29 Atl. 433.

⁸⁷ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692.

⁸⁸ *Ambrose v. Kerrison*, 20 Law J. C. P. 135; *Bradshaw v. Beard*, 12 C. B. (N. S.) 344; *Jenkins v. Tucker*, 1 H. Bl. 90; *Cunningham v. Reardon*, 98 Mass. 538; *Sears v. Giddey*, 41 Mich. 590, 2 N. W. 917.

her husband, the latter's liability is based on the theory of agency; but it is agency in law only, or quasi agency, for there is no agency in fact. In the case of funeral expenses of the wife, the husband's liability is not necessarily based on any theory of agency. In both cases the real ground of his liability is the same, resting, as it does, on the duty of the husband which he has neglected, and which another has performed for him. In both cases the law imposes a liability quasi ex contractu.

Since the husband is liable for his wife's funeral expenses, it would seem to follow necessarily that when he pays them he pays his own debt, and, in the absence of any agreement, is not entitled to reimbursement out of the wife's separate estate; and it has been so held.⁸⁹ Some of the courts, however, have taken the contrary view.⁹⁰

The husband's liability is not affected by the fact that the wife left property by a will to another person, and that the latter assisted in the arrangements and direction of the funeral.⁹¹ And the fact that the wife is living apart from her husband, through her own fault, though it would relieve him, as has been shown, from liability for her necessities, will not relieve him from liability for her funeral expenses.⁹²

HUSBAND'S LIABILITY FOR WIFE'S ANTENUPTIAL DEBTS.

74. The husband becomes liable on marriage for his wife's antenuptial debts. But his liability lasts only during the coverture, after which the liability of the wife revives. This liability has been very generally abolished by statute.

⁸⁹ *Smyley v. Reese*, 53 Ala. 89; *Staples' Appeal*, 52 Conn. 425; *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825.

⁹⁰ *Gregory v. Lockyer*, 6 Madd. 90; *In re McMyn*, 33 Ch. Div. 575; *McCue v. Garvey*, 14 Hun. 562; *McClellan v. Filson*, 44 Ohio St. 184, 5 N. E. 861 (In this case, however, the funeral expenses were paid out of the wife's estate by her executor, not the husband).

⁹¹ *Sears v. Giddey*, 41 Mich. 590, 2 N. W. 917.

⁹² *Seybold v. Morgan*, 43 Ill. App. 39.

The husband is liable during coverture for the debts contracted by his wife while sole.⁹³ His liability, however, continues only during coverture, and debts not put in judgment during that time cannot thereafter be enforced against him.⁹⁴ Although he may have received a large fortune in acquiring his wife's personal property by the marriage, yet he retains the same, on her death, free from any liability to answer for her antenuptial debts.⁹⁵ And even a court of equity will not help creditors in subjecting what the husband has received to their claims.⁹⁶ The husband is equally liable for his wife's debts contracted *dum sola* where she brings him no fortune.⁹⁷ Her choses in action, not reduced to possession by the husband during coverture, however, may be reached by the wife's creditors after her death.⁹⁸ On the theory that the husband's liability for his wife's debts rests on the fact that marriage vests in the husband all his wife's chattels, and the right to reduce her choses in action to possession, whether the husband is an infant or not, it is held that an infant husband is liable for his wife's debts.⁹⁹ The husband's liability is limited to the obligations that were legally binding on his wife; and hence, if his wife was an infant, he is only liable for her necessities.¹⁰⁰ If the wife survives her husband, she again becomes liable for her debts contracted *dum sola*, although she may have brought her husband a

⁹³ 1 Bl. Comm. 443; 2 Kent, Comm. 143; *Thomond v. Suffolk*, 1 P. Wms. 462, 469; *Heard v. Stamford*, 3 P. Wms. 409; *Barnes v. Underwood*, 47 N. Y. 351; *Cole v. Shurtleff*, 41 Vt. 311; *Platner v. Patchin*, 19 Wis. 333; *Howes v. Bigelow*, 13 Mass. 384; *Bryan v. Doolittle*, 38 Ga. 255; *Hetrick v. Hetrick*, 13 Ind. 44; *Morrow v. Whitesides' Ex'r*, 10 B. Mon. (Ky.) 411; *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

⁹⁴ See the cases cited above.

⁹⁵ *Heard v. Stamford*, 3 P. Wms. 409; *Thomond v. Suffolk*, 1 P. Wms. 469; *Barnes v. Underwood*, 47 N. Y. 351; *Cureton v. Moore*, 2 Jones, Eq. (N. C.) 204.

⁹⁶ *Heard v. Stamford*, 3 P. Wms. 409; *Morrow v. Whitesides' Ex'r*, 10 B. Mon. (Ky.) 411; *Cureton v. Moore*, 2 Jones, Eq. (N. C.) 204.

⁹⁷ *Thomond v. Suffolk*, 1 P. Wms. 469.

⁹⁸ *Heard v. Stamford*, 3 P. Wms. 409; ante, p. 88.

⁹⁹ *Reeves*, Dom. Rel. 234; *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Butler v. Breck*, 7 Metc. (Mass.) 164; *Cole v. Seeley*, 25 Vt. 220.

¹⁰⁰ *Anderson v. Smith*, 33 Md. 465; *Bonney v. Reardin*, 6 Bush (Ky.) 34.

fortune from which he has neglected to pay them.¹⁰¹ In an action to enforce the husband's liability, the husband and wife must be sued jointly.¹⁰² In most states by statute the common law liability of the husband for his wife's antenuptial debts has been abolished.

¹⁰¹ *Woodman v. Chapman*, 1 Camp. 189; *Parker v. Steed*, 1 Lea (Tenn.) 206.

¹⁰² *Mitchinson v. Hewson*, 7 Term R. 348; *Gage v. Reed*, 15 Johns. (N. Y.) 403; *Cole v. Shurtleff*, 41 Vt. 311; *Platner v. Patchin*, 19 Wis. 333.

CHAPTER V.

WIFE'S EQUITABLE AND STATUTORY SEPARATE ESTATE.

- 75. Equitable Separate Estate.
- 76. Jus Disponendi.
- 77-79. Power to Charge by Contract.
- 80. Statutory Separate Estate.
- 81. Jus Disponendi.
- 82-84. Power to Charge by Contract.

The extent to which property rights are affected by coverture at common law, and the power of a married woman, at common law, to dispose of her property, and to enter into contracts, have been explained. And attention was called to the fact that the common-law doctrine does not apply to the full extent in equity, nor under modern statutes. In this chapter the doctrine of courts of equity in relation to property settled to the separate use of the wife, called her "equitable separate estate," including her power to dispose of the same, and contract in relation to it, will be explained. And then the law governing the separate statutory estate of a married woman, and her powers in relation thereto, will be considered.

EQUITABLE SEPARATE ESTATE.

75. In equity, a married woman may hold as a feme sole, and free from the control of her husband, property, real or personal, settled to her sole and separate use. To create an equitable separate estate in the wife, there must be an intention that the wife shall take, and that the husband shall not.

To mitigate the hardships arising from the rules of the common law giving to the husband rights in his wife's property, equity has recognized, or rather created, a doctrine by which a married woman may acquire and hold a separate estate, both real and personal, independently of her husband, and free from his control. For this purpose equity treats married women, in relation to their sep-

arate property, as if sole.¹ This doctrine is a creature of equity only, and was unknown to the common law. The doctrine applies only to property held to the wife's separate use by the terms of some agreement or conveyance, as under antenuptial or postnuptial agreements with her husband, gifts from her husband or strangers, or conveyances, devises, or bequests.² Trust estates, not limited to her separate use, are not equitable separate estates falling within this rule.³

It is well settled that to create an equitable separate estate the intention to create it must clearly appear. As has often been said in the cases, the words used in the grant or other instrument must clearly show that it is intended that the wife shall take, and the husband shall not. If this definitely appears, the form of the words is immaterial.⁴ No trustee need be named for the wife. If no one is named as trustee, equity will nevertheless treat the property as her separate estate, and hold the husband as trustee.⁵

¹ *Hulme v. Tenant*, 1 Brown, Ch. 16, 1 White & T. Lead. Cas. Eq. 679, and authorities there cited; *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 549. And see authorities hereinafter referred to.

² 3 Pom. Eq. Jur. § 1101.

³ 3 Pom. Eq. Jur. § 1098; *Taylor v. Meads*, 4 De Gex, J. & S. 597.

⁴ *Buck v. Wroten*, 24 Grat. (Va.) 250; *Rixey's Adm'r v. Deitrick*, 85 Va. 42, 6 S. E. 617. The word "separate" has acquired a technical meaning, and, where it is used in this connection, it is sufficient to create a separate estate. But the word "sole" has not necessarily this effect. *Massy v. Rowen*, L. R. 4 H. L. 288. The courts have held sufficient the words "for her sole and separate use," *Parker v. Brooke*, 9 Ves. 583, 587; "as her separate estate," *Fox v. Hawkes*, 13 Ch. Div. 822; *Swain v. Duane*, 48 Cal. 358; "for her own use, independent of her husband," *Wagstaff v. Smith*, 9 Ves. 520; "for her own use and benefit, independent of any other person," *Margetts v. Barringer*, 7 Sim. 482; "that she shall receive and enjoy the issues and profits," *Tyrrell v. Hope*, 2 Atk. 561. The courts have passed on the sufficiency of innumerable phrases. For a collection of the cases, see the notes to 3 Pom. Eq. Jur. § 1102, and *Stew. Husb. & W.* § 200. The principle is well settled that, as held in *Re Peacock's Trusts*, 10 Ch. Div. 490, an intention must appear that the wife shall take, and that the husband shall not; but there are many inconsistencies in the cases in applying this principle to particular words.

⁵ *Story*, Eq. Jur. § 1380; 3 Pom. Eq. Jur. § 1100; *Bennet v. Davis*, 2 P. Wms. 316; *Newlands v. Paynter*, 4 Mylne & C. 408; *Jones v. Clifton*, 101

The property settled to a wife's separate use may be real or personal or any interest therein, as well as the rents and income therefrom,⁶ and investments made from the savings of such rents or income⁷ or from the proceeds of sales.⁸ Personal property in possession, settled to the separate use of the wife, and not disposed of by her, passes to the husband on her death *jure mariti*, and not to her personal representatives, for a wife's separate estate lasts only during coverture.⁹

POWER TO DISPOSE OF EQUITABLE SEPARATE ESTATE.

76. In most jurisdictions a married woman has the power to dispose of her equitable separate estate, real or personal, though no power to do so is expressly conferred by the instrument creating it, provided the power is not expressly excluded. In some jurisdictions it is held that the power must be expressly conferred.

Whether or not a married woman has the power to dispose of her equitable separate estate is a question upon which the authorities are in direct conflict. It has been established by the court of chancery in England, and the doctrine is recognized in some of our states, that, even though no power to dispose of her separate equitable estate is expressly conferred by the instrument creating it, she has such power, on the theory that the power is a necessary incident of the estate.¹⁰ According to this doctrine, she

U. S. 225; *Porter v. Bank*, 19 Vt. 410; *Firemen's Ins. Co. of Albany v. Bay*, 4 Barb. (N. Y.) 407; *Varner's Appeal*, 80 Pa. St. 140.

⁶ 3 Pom. Eq. Jur. § 1103; *Cheever v. Wilson*, 9 Wall. 108; *Vizonneau v. Pegram*, 2 Leigh (Va.) 183.

⁷ *Barrack v. McCulloch*, 3 Kay & J. 110; *Gore v. Knight*, 2 Vern. 535. But see, *contra*, *Ordway v. Bright*, 7 Heisk. (Tenn.) 681.

⁸ *Justis v. English*, 30 Grat. (Va.) 565; *City Nat. Bank of Providence, R. I.*, v. *Hamilton*, 34 N. J. Eq. 158.

⁹ 2 Macq. Husb. & W. 288; *Molony v. Kennedy*, 10 Sim. 254; *Brown's Adm'rs v. Brown's Adm'rs*, 6 Humph. (Tenn.) 127.

¹⁰ *Fettiplace v. Gorges*, 1 Ves. Jr. 46; *Rich v. Cockell*, 9 Ves. 369; *Lechmere v. Brotheridge*, 32 Beav. 353; *Farington v. Parker*, L. R. 4 Eq. 116; *Rad-*

may dispose of her equitable separate estate, whether it is real or personal, either by will, or by gifts, transfers, or conveyances, provided the instrument creating the estate does not expressly or by clear implication restrain her from doing so. And she may do so without the consent or concurrence of her husband or her trustee, in the absence of express restraint in the instrument.¹¹ In some states the courts have refused to recognize this doctrine, and have held that a wife has no power to dispose of her equitable separate estate, unless the power has been expressly conferred.¹²

Where the wife has the unrestricted power to dispose of her equitable separate estate, she may dispose of it in any way she may see fit, and she may therefore give or convey it to her husband as well as to any other person; but the disposition in such a case "must be free,—neither the result of flattery, nor of force, nor harsh and cruel treatment."¹³

ford v. Carwile, 13 W. Va. 572; Frary v. Booth, 37 Vt. 78; Imlay v. Huntington, 20 Conn. 146; Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548; Leaycraft v. Hedden, 4 N. J. Eq. 551; Buchanan v. Turner, 26 Md. 1; Penn v. Whitehead, 17 Grat. (Va.) 503; Bank of Greensboro v. Chambers, 30 Grat. (Va.) 202; Bain v. Buff's Adm'r, 76 Va. 371; Collins v. Wassell, 34 Ark. 17; Miller v. Voss, 62 Ala. 122; Dallas v. Heard, 32 Ga. 604; Smith v. Thompson, 2 MacArthur (D. C.) 291; Miller v. Newton, 23 Cal. 554; Poind v. Carpenter, 12 Minn. 430 (Gil. 315); Burch v. Breckinridge, 16 B. Mon. (Ky.) 482; Metropolitan Bank v. Taylor, 53 Mo. 444. The *jus disponendi* extends to her lands in fee in England. Taylor v. Meads, 4 De Gex, J. & S 597, 604. But in this country it has been held otherwise. Radford v. Carwile, 13 W. Va. 572; Bank of Greensboro v. Chambers, 30 Grat. (Va.) 202; Armstrong v. Ross, 20 N. J. Eq. 109.

¹¹ Jaques v. Methodist Episcopal Church, *supra*, and other cases cited.

¹² Ewing v. Smith, 3 Desaus. (S. C.) 417; Hardy v. Holly, 84 N. C. 661; Maurer's Appeal, 86 Pa. St. 380; Metcalf v. Cook, 2 R. I. 355 (criticised in Ives v. Harris, 7 R. I. 413); Doty v. Mitchell, 9 Smedes & M. (Miss.) 435; Bressler v. Kent, 61 Ill. 426; Hix v. Gosling, 1 Lea (Tenn.) 560.

¹³ Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 549.

POWER TO CHARGE EQUITABLE SEPARATE ESTATE BY CONTRACT.

77. In England, and in most of our states, a married woman has the power, as an incident to her separate estate, to charge it by contract, unless the power is excluded in the creation of the estate. In some states the power must be expressly conferred.
78. In England, and in some of the states, this power is not limited to contracts for the benefit of the estate, or even for the benefit of the wife generally. In some states it is so limited. In others it is limited to contracts for the benefit of the estate itself.
79. In England, and in all of the states, the contract must be made upon the faith of the estate. In England, and in some states, whether it was so made is to be ascertained from all the surrounding circumstances. In other states it must expressly purport to charge the estate.

The court of chancery in England having established the doctrine of the wife's separate property, it was held to follow that a married woman could not claim the protection of equity in the enjoyment and disposition of her property without being subject to the burdens incident to ownership. While her contracts were void at law, equity introduced the innovation that, if she entered into an obligation which, if she were sole, would constitute a personal obligation against her, and purported to contract on the faith and credit of her separate estate, though she did not render herself personally liable, yet her separate estate was thereby charged; and it was considered to be immaterial whether the contract was for the benefit of the separate estate or not, or even whether it was for her benefit or not.¹⁴ "The separate property of a married woman," it was said, "being a crea-

¹⁴ *Matthewman's Case*, L. R. 3 Eq. 781, 787; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494, 509; *Hulme v. Tenant*, 1 Brown, Ch. 16, 1 *White & T. Lead. Cas.* Eq. 679, and authorities there collated.

ture of equity, it follows that, if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."¹⁵

Some of the American courts have recognized and followed the doctrine of the English court, and hold that the power to charge the estate with debts is incident to the ownership of the estate; that it need not be expressly conferred by the instrument creating the estate; and, further than this, that the debt need not be for the benefit of the estate, or even for the benefit of the wife. Thus it has been held that separate property of a married woman, conferred upon her by marriage settlement (and the rule would apply to separate property conferred in any other way), which provides that she shall have the complete control of it as though the marriage had never taken place, and contains no restraint upon alienation, causes her to be regarded in a court of equity, with regard to such property, as a feme sole, and she may, by her agreement, freely entered into, charge it even for the payment of her husband's debts.¹⁶

In some states it is held that the contract must be for the benefit of the estate. In these states a married woman has no power to bind her separate estate at all, even by expressly charging it, unless the contract is for the benefit of the estate itself.¹⁷ In other states it seems to be the rule that the contract must be either for the benefit of the separate estate or for the benefit of the wife generally.¹⁸

In some states, as has been seen, it is held that a married woman has no power to dispose of her separate estate, unless that power

¹⁵ *Owens v. Dickenson*, Craig & P. 48.

¹⁶ *Bradford v. Greenway*, 17 Ala. 797. And see *Bain v. Buff's Adm'r*, 76 Va. 371.

¹⁷ *Willard v. Eastham*, 15 Gray (Mass.) 328; *Heburn v. Warner*, 112 Mass. 271; *Adams v. Mackey*, 6 Rich. Eq. (S. C.) 75; *Musson v. Trigg*, 51 Miss. 172; *Owens v. Johnson*, 8 Baxt. (Tenn.) 265.

¹⁸ *Yale v. Dederer*, 18 N. Y. 265; *Kantrowitz v. Prather*, 31 Ind. 92; *Wilson v. Jones*, 46 Md. 349; *Homeopathic Mut. Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Elliott v. Gower*, 12 R. I. 79; *Dale v. Robinson*, 51 Vt. 20; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374.

is expressly conferred by the instrument creating the estate. So, on the same reasoning, it is there held that she cannot charge her separate estate by contracts in relation thereto unless the power has been expressly conferred upon her in the creation of the estate.¹⁹ In no case can a married woman charge her separate estate by contract if she is restrained from doing so by the instrument creating it.

It must be borne in mind that under this doctrine a married woman has no more power in equity than she has at law to bind herself personally by her contracts, even where they are made in relation to, and for the benefit of, her equitable separate estate. Equity merely lays hold of the estate to satisfy the debt, and does not undertake to hold her personally liable. She binds the estate only, and not herself.

It is not every contract of a married woman that is binding upon her equitable separate estate, even if it is for the benefit of the estate. In all jurisdictions it is held that the contract must have been made on the faith of that estate. If a man, for instance, should sell a married woman goods, not knowing she had a separate estate, but trusting her personally, he could not afterwards hold the estate liable.

As to the sufficiency of the circumstances to show that the contract sought to be enforced was made on the faith of the separate estate, so as to constitute a charge upon it, the courts are not agreed, and the rules are different in the different jurisdictions. According to the English doctrine the contract need not show by express terms that it was made on the credit of the estate; but it is sufficient if it appears from all the surrounding circumstances that it was made with intent to charge the estate.²⁰ And this rule has been substantially adopted by the courts of some of our states.²¹ It was said in an English case: "In order to bind

¹⁹ Willard v. Eastham, 15 Gray (Mass.) 328; Heburn v. Warner, 112 Mass. 271; Adams v. Mackey, 6 Rich. Eq. (S. C.) 75; Musson v. Trigg, 51 Miss. 172; Owens v. Johnson, 8 Baxt. (Tenn.) 265.

²⁰ Lewin, Trusts, 767; Perry, Trusts, § 659; Johnson v. Gallagher, 3 De Gex, F. & J. 494; Matthewman's Case, L. R. 3 Eq. 781; Shattock v. Shattock, L. R. 2 Eq. 182.

²¹ Sprague v. Tyson, 44 Ala. 338; De Baun v. Van Wagoner, 56 Mo. 317; Avery v. Vansickle, 35 Ohio St. 270; Harshberger's Adm'r v. Alger, 31 Grat. (Va.) 52; Radford v. Carwile, 13 W. Va. 572.

her separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith and credit of, that estate; and the question whether it was so or not is to be judged of by the court upon all the circumstances of the case."²² In some of the states it is held that the contract must expressly purport to charge the separate estate.²³ And in still other states it is held that the contract must expressly purport to charge the estate if it is not for the benefit of the estate itself, but for the benefit of the wife generally.²⁴

STATUTORY SEPARATE ESTATE.

80. The common law, in so far as it affects the property of the wife, has been greatly modified by modern statutes. The result of these statutes may be stated thus:

- (a) Perhaps in all the states the real estate owned by a woman at the time of her marriage remains her separate property after marriage.
- (b) In many states real estate acquired by her after marriage, by devise, descent, or purchase, becomes and remains her separate property.
- (c) In some states real estate acquired in any way becomes and remains her separate property.
- (d) In most states the personal property owned by a woman at the time of her marriage remains her separate property after marriage.
- (e) In most states personal property acquired by her after marriage, by bequest or descent, and in some states by purchase, becomes and remains her separate property.

²² Johnson v. Gallagher, *supra*.

²³ Willard v. Eastham, 15 Gray (Mass.) 328; Heburn v. Warner, 112 Mass. 271; Adams v. Mackey, 6 Rich. Eq. (S. C.) 75; Musson v. Trigg, 51 Miss. 172; Owens v. Johnson, 8 Baxt. (Tenn.) 265.

²⁴ Yale v. Dederer, 18 N. Y. 265; Kantrowitz v. Prather, 31 Ind. 92; Wilson v. Jones, 46 Md. 349; Homeopathic Mut. Life Ins. Co. v. Marshall, 32 N. J.

It has been seen in another chapter that at common law the husband acquires certain rights in his wife's real estate, and acquires the absolute right to all her personalty in possession, and the right to reduce her choses in action to possession. As already stated, the legislatures have in modern times enacted laws changing the common law to a greater or less extent in the different states. In no state is the common law now in force to its full extent. The statutes vary so much in the different states that we can only refer to them in a general way.

Statutes have been passed in all the states of this country, perhaps, enacting that the real property of a woman remains her separate property upon her marriage,²⁵ and in many states the real property acquired by the wife after marriage, by devise or descent, or by purchase, and in some states the real property acquired in any manner, becomes her separate property.²⁶ In most states it is enacted that the personal property of a woman, upon her marriage, remains her sole and separate property,²⁷ and so in most states, as to personal property acquired after marriage, by devise or descent, and in a few states by purchase.²⁸ The statutes are, as a rule, so clearly worded that there is no difficulty in determining their effect in so far as they give the wife certain property owned or acquired by her as her separate estate. The chief difficulty has been in determining the powers and liabilities of the wife in respect to such property.

The general rule for the construction of these separate property acts is that they are to be so construed as to give full effect to their terms, but, since they are in derogation of the common law, they are not to be extended further. They do not impliedly abrogate the common law beyond their terms.²⁹ Where a statute provided that the wife should hold her separate estate to her sole and separate use, and that it should not be subject to the disposal of her husband, nor

Eq. 103; *Elliott v. Gower*, 12 R. I. 79; *Dale v. Robinson*, 51 Vt. 20; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374.

²⁵ Stim. Am. St. Law, § 6420.

²⁶ Stim. Am. St. Law, § 6422.

²⁷ Stim. Am. St. Law, § 6420.

²⁸ Stim. Am. St. Law, § 6422.

²⁹ Post, p. 144.

be liable for his debts, it was held that the husband was nevertheless entitled to an estate by the curtesy, as the statute could have full effect without impairing his right thereto.³⁰ Nor will such an enactment deprive the husband of the right to administer on his wife's estate.³¹

When property is conveyed to husband and wife jointly, they take, as we have seen, as tenants by the entirety; that is, neither of them takes an undivided share separately from the other, but each has an interest in the whole, and on the death of either the property belongs to the other. Neither can defeat the rights of the other as survivor.³² It has been held, therefore, that the wife has not such an interest in such property that it can be called her separate property within the meaning of the separate property acts.³³

Constitutionality of Statutes—Retrospective Construction.

In most states there are constitutional provisions prohibiting the legislature from passing retrospective laws. "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in relation to transactions or considerations already past, must be deemed retrospective," and therefore in violation of such constitutional provisions.³⁴ Under such a provision, or one having a similar prohibitory effect, the legislature cannot take away or impair rights which have already vested in the husband by virtue of the marriage. If a husband has already acquired by virtue of the marriage and the existing law a vested right in property owned by his wife either at the time of the marriage or afterwards, whether it be real or personal, such right cannot constitutionally be taken

³⁰ Johnson v. Cummins, 16 N. J. Eq. 97; Cole v. Van Riper, 44 Ill. 58. Contra, Billings v. Baker, 28 Barb. (N. Y.) 348.

³¹ Johnson v. Cummins, 16 N. J. Eq. 97; Shumway v. Cooper, 16 Barb. (N. Y.) 556; Vallance v. Bausch, 28 Barb. (N. Y.) 633; Ransom v. Nichols, 22 N. Y. 110.

³² Ante, p. 103, "Estate by Entirety."

³³ Speier v. Opfer, 73 Mich. 35, 40 N. W. 909; Curtis v. Crowe, 74 Mich. 99, 41 N. W. 876. But see Dreutzer v. Lawrence, 58 Wis. 594, 17 N. W. 423.

³⁴ Society for the Propagation of the Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Leete v. State Bank, 115 Mo. 184, 21 S. W. 788.

from him by legislative enactment.³⁵ But there is nothing in such constitutional prohibitions to prevent the legislature from defeating mere expectancies where no rights have vested in him. There is nothing unconstitutional in a statute giving married women the sole right to property that may afterwards be acquired by them, whether real or personal, or to the future income or profits of land owned by them at the time the statute is enacted. Such a statute neither defeats nor impairs any vested right either of the husband or of his creditors.³⁶

³⁵ *Farrell v. Patterson*, 43 Ill. 52; *Dubois v. Jackson*, 49 Ill. 49; *Almond v. Bonnell*, 76 Ill. 537; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Coombs v. Read*, 16 Gray (Mass.) 271; *Dunn v. Sargent*, 101 Mass. 336; *Carter v. Carter*, 14 Smedes & M. (Miss.) 59; *Eldridge v. Preble*, 34 Me. 148; *Erwin v. Puryear*, 50 Ark. 356, 7 S. W. 449; *Wythe v. Smith*, 4 Sawy. 17, Fed. Cas. No. 18,122.

³⁶ See *Baker's Ex'rs v. Kilgore*, 145 U. S. 487, 12 Sup. Ct. 943; *Allen v. Hanks*, 136 U. S. 300, 10 Sup. Ct. 961; *Holliday v. McMillan*, 79 N. C. 315, 318; *Quigley v. Graham*, 18 Ohio St. 42; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Buchanan v. Lee*, 69 Ind. 117; *Sperry v. Haslam*, 57 Ga. 412; *Niles v. Hall*, 64 Vt. 453, 25 Atl. 479. It has been held that a husband's interest as tenant by the curtesy initiate, at common law, in land owned by his wife, is not a vested right, and may be interrupted by legislation before it becomes consummate by the death of the wife. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335. See *Hill v. Chambers*, 30 Mich. 422. But the better opinion is to the contrary. See *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51; *Rose v. Sanderson*, 38 Ill. 247. See, as to the effect of the separate property acts on the husband's interest in his wife's lands, *Prall v. Smith*, 31 N. J. Law, 244; *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *Eldridge v. Preble*, 34 Me. 148; *Burson's Appeal*, 22 Pa. St. 164; *Bouknight v. Epting*, 11 S. C. 71. The legislature, however, may clearly defeat, by a statute, any right to curtesy which he would otherwise have in land which may be acquired by the wife after the adoption of the statute. *Baker's Ex'rs v. Kilgore*, supra; *Allen v. Hanks*, supra. And it may defeat a husband's expectancy of a tenancy by the curtesy; that is, it may abolish curtesy, or modify the existing law, before the husband's interest becomes initiate. *Cooley*, Const. Lim. 440; *Wyatt v. Smith*, 25 W. Va. 813; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681. See *Hill v. Chambers*, 30 Mich. 422. It cannot defeat a vested estate by the entirety. *Almond v. Bonnell*, 76 Ill. 536. It has also been held by some courts that a husband's right to reduce his wife's choses in action to possession is not a vested right, even as to existing choses in action not reduced, and that it may be interrupted by legislation. *Alexander v. Alexander*, 85 Va. 353, 7

Statutes taking from the husband rights which are given him at common law in his wife's property will not be construed as having a retroactive effect, even where retroactive laws are not prohibited by the constitution of the particular state, unless the intention of the legislature that they shall have such effect is clearly expressed, and the language employed admits of no other construction. That intention is not to be assumed by the mere fact that the language of the statute is general, and might include past as well as future transactions.⁸⁷

Constitutional prohibitions against laws impairing the obligation of contracts prevent the legislatures from passing laws impairing the obligation of contracts made by a husband concerning property of his wife, which he had a right to make by virtue of the marriage and under existing laws; but marriage is not a contract within the meaning of such provisions, and they cannot be set up to defeat legislation taking from a husband rights in his wife's property.⁸⁸

POWER TO DISPOSE OF STATUTORY SEPARATE ESTATE.

81. A married woman has no power to dispose of her statutory separate estate unless the power is expressly or impliedly given her by the statute. Though some courts hold otherwise in the case of personal property, the rule is that a statute merely giving the right to hold and enjoy, or the *jus tenendi*, does not include the *jus disponendi*.

S. E. 335; *Clarke v. McCreary*, 12 Smedes & M. (Miss.) 347; *Percy v. Cockrill*, 53 Fed. 872, 881; *Goodyear v. Rumbaugh*, 13 Pa. St. 480; *Mellinger's Adm'r v. Bausman's Trustee*, 45 Pa. St. 522, 529; *Henry's Ex'r v. Dilley*, 25 N. J. Law, 302. But the better opinion is to the contrary. *Dunn v. Sargent*, 101 Mass. 336; *Westervelt v. Gregg*, 12 N. Y. 202; *Norris v. Beyea*, 13 N. Y. 273, 288; *Ryder v. Hulse*, 24 N. Y. 372; *Leete v. State Bank* (Mo. Sup.) 21 S. W. 788; *Sterns v. Weathers*, 30 Ala. 712; *Kidd v. Montague*, 19 Ala. 619; *Anderson v. Anderson*, 1 Ala. Sel. Cas. 612.

⁸⁷ See *Stilphen v. Stilphen*, 65 N. H. 126, 23 Atl. 79; *Leete v. State Bank* (Mo. Sup.) 21 S. W. 788, and authorities there cited. See, also, the cases cited in note 36, *supra*.

⁸⁸ *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723; *ante*, p. 4, and cases there cited.

Under a statute providing that a married woman shall have the same rights over her separate property as if unmarried, she has the right to dispose of it.³⁹ The *jus disponendi* will not be implied, however, from a bare *jus tenendi*.⁴⁰ Statutes giving the right to hold, own, possess, and enjoy,⁴¹ or to hold to her sole and separate use, as if she were a single female,⁴² have been held not to include the power to dispose of real estate. In some states it has been held that the rule is different in the case of personalty, and that the *jus disponendi* is a necessary incident to the separate ownership of personal property.⁴³ Whether this distinction is well founded is doubtful, and some of the courts have refused to recognize it.⁴⁴

POWER TO CHARGE STATUTORY SEPARATE ESTATE BY CONTRACT.

82. In the absence of express enactment, statutes giving married women separate property do not impliedly authorize a married woman to contract generally; but she can contract so as to render her statutory separate property liable

- (a) Where the contract would bind her equitable separate property.
- (b) Where the statute expressly authorizes her to contract with reference to her separate property.
- (c) Where the statute enacts that she may enjoy her separate property as if sole.

83. Statutes authorizing married women to acquire and hold property authorize the performance of all acts and the making of all contracts that are necessa-

³⁹ *Beal v. Warren*, 2 Gray (Mass.) 447.

⁴⁰ *Miller v. Wetherby*, 12 Iowa, 415; *Cole v. Van Riper*, 44 Ill. 58; *Bressler v. Kent*, 61 Ill. 426; *Naylor v. Field*, 29 N. J. Law, 287.

⁴¹ *Cole v. Van Riper*, *supra*; *Bressler v. Kent*, *supra*.

⁴² *Naylor v. Field*, *supra*.

⁴³ *Naylor v. Field*, *supra*; *Harding v. Cobb*, 47 Miss. 599; *Beard v. Dedolph*, 29 Wis. 136.

⁴⁴ *Swift v. Luce*, 27 Me. 285; *Brown v. Fifield*, 4 Mich. 322; *Scott v. Scott*, 13 Ind. 225; *Moore v. Cornell*, 68 Pa. St. 320.

rily incident thereto, but do not abrogate the common law further than is necessary to give them full effect.

84. Equitable jurisdiction over equitable separate property has been extended in some states to statutory separate property, but not in all states. Contracts concerning such property are therefore enforceable

- (a) In some states, in equity only.
- (b) In other states, at law only.
- (c) In other states, either at law or in equity.

Difficult questions sometimes arise in determining the extent to which the statutes giving the wife the right to hold and enjoy her separate property free from the control of her husband have removed the common-law disability of married women to contract, and there is considerable conflict in the cases on some points. It is clear that, while they give a married woman certain rights in regard to her statutory separate property which she did not have at common law, they fall far short of placing her in the position of a feme sole. They are held to abridge the rights of the husband, and remove the disabilities of the wife, only so far as they expressly do so, and are held not to impliedly abrogate the common law beyond their terms.⁴⁵ Such statutes, therefore, in the absence of any enactment allowing married women to contract as if sole,⁴⁶ do not enable her to make contracts not connected with her separate property.⁴⁷ Whatever power the wife has to contract is given her by the statutes. In Michigan, as in many other states, the statutes have not given her the power to contract except in regard to her separate property. It has, therefore, been held in that state that, as real property held by

⁴⁵ *Speier v. Opfer*, 73 Mich. 35, 40 N. W. 909; *Russel v. Bank*, 39 Mich. 671; and cases hereafter cited.

⁴⁶ As we have seen, such statutes have been enacted in a few states.

⁴⁷ *Russel v. Bank*, *supra*; *Speier v. Opfer*, *supra*; *Bank v. Partee*, 99 U. S. 325; *Cary v. Dixon*, 51 Miss. 593; *Jenne v. Marble*, 37 Mich. 319; *Hodges v. Price*, 18 Fla. 342; *O'Daily v. Morris*, 31 Ind. 111; *McKee v. Reynolds*, 26 Iowa, 578; *Pond v. Carpenter*, 12 Minn. 430 (Gil. 315); *Ritch v. Hyatt*, 3 MacArthur (D. C.) 536.

husband and wife jointly is held by them as tenants by the entirety, and cannot be regarded as the wife's separate property, she is not liable on a contract made jointly with her husband for improvements on such property.⁴⁸

By the statutes of some states the wife is expressly given the power to make contracts "relating to" or "with reference to" or "in respect to," etc., her separate estate. These expressions are generally held to include whatever is necessary to the full enjoyment and use of the property;⁴⁹ but a possible incidental benefit, as where a woman indorses a note for the benefit of a corporation in which she is stockholder, is too remote.⁵⁰ "Such a contract," said Judge Cooley, "is not within the words of the statute. Neither is it within the spirit of the statute, for that had in view the relieving of the wife of disabilities which operated unfairly and oppressively, and which hampered her in the control and disposition of her property for the benefit of herself and her family. It was not its purpose to give her a general power to render herself personally responsible upon engagements for any and every consideration which would support a promise at the common law. * * * The test of competency is to be found in this: that it does or does not deal with the individual estate. Possible incidental benefits cannot support it." A contract to sell her separate estate is "in respect to" her separate property;⁵¹ and so is a mortgage thereon.⁵² Notes and other obligations, given for the price of property, on its purchase by her, have been held to be contracts "in respect to" her separate property,⁵³ though there are a number of cases to the contrary.⁵⁴

⁴⁸ *Speier v. Opfer*, 73 Mich. 35, 40 N. W. 909; *Curtis v. Crowe*, 74 Mich. 99, 41 N. W. 876. But see *Dreutzer v. Lawrence*, 58 Wis. 594, 17 N. W. 423.

⁴⁹ *Marlow v. Barlew*, 53 Cal. 456; *Parker v. Kane*, 4 Allen (Mass.) 340; *Basford v. Pearson*, 7 Allen (Mass.) 504; *Burr v. Swan*, 118 Mass. 588; *Albin v. Lord*, 39 N. H. 196, 202; *Batchelder v. Sargent*, 47 N. H. 262; *McCormick v. Holbrook*, 22 Iowa, 487.

⁵⁰ *Russel v. Bank*, 39 Mich. 671.

⁵¹ *Basford v. Pearson*, 7 Allen (Mass.) 504; *Baker v. Hathaway*, 5 Allen (Mass.) 103; *Richmond v. Tibbles*, 26 Iowa, 474.

⁵² *Marlow v. Barlew*, 53 Cal. 456; *Messer v. Smyth*, 58 N. H. 298.

⁵³ *Messer v. Smyth*, 58 N. H. 298; *Dailey v. Manufacturing Co.*, 88 Mo.

⁵⁴ *Jones v. Crosthwaite*, 17 Iowa, 393; *Schneider v. Garland*, 1 Mackey (D. C.) 350; *Carpenter v. Mitchell*, 50 Ill. 470.

Many illustrations might be cited to show that the general rule is that a married woman has no powers now which she did not have at common law, except such as are in express terms given her by the statute, and such as are necessarily incidental thereto. Thus, where a statute authorized a married woman "to contract, sell, transfer, mortgage, convey, devise, and bequeath" her separate statutory property "in the same manner and with like effect as if unmarried," a transfer of a note owned by a married woman, by indorsement, as collateral security for the debt of another, was held void, as the statute did not empower her to enter into a contract of suretyship.⁵⁵

It has been shown in the preceding section that, under a statute providing that a married woman shall have the same rights over her separate property as if unmarried, she has the right to dispose of it,⁵⁶ or to agree to dispose of it,⁵⁷ but that the *jus disponendi* will not be implied from a bare *jus tenendi*;⁵⁸ that, for instance, a statute giving the right to hold, own, possess, and enjoy,⁵⁹ or to hold to her sole and separate use, as if she were a single female,⁶⁰ does not include the power to dispose of real estate. It has also been pointed out that in some states it has been held that the rule is different in the case of personalty, and that the *jus disponendi* is a necessary incident to the separate ownership of personal property,⁶¹ but that this distinction is not recognized in all the states.⁶² Where there is no express statutory authority to contract, but it is enacted,

301; *Tillman v. Shackleton*, 15 Mich. 447. Under the New York married woman's act, a married woman may borrow money and purchase upon credit any property necessary or convenient for the purpose of commencing, as well as carrying on, a trade or business. *Frecking v. Rolland*, 53 N. Y. 422.

⁵⁵ *Russel v. Bank*, 39 Mich. 671.

⁵⁶ *Beal v. Warren*, 2 Gray (Mass.) 447; ante, p. 143.

⁵⁷ *Dreutzer v. Lawrence*, 58 Wis. 594, 17 N. W. 423.

⁵⁸ *Miller v. Wetherby*, 12 Iowa, 415. And see *Cole v. Van Riper*, 41 Ill. 58; *Bressler v. Kent*, 61 Ill. 426; *Naylor v. Field*, 29 N. J. Law, 287; ante, p. 143.

⁵⁹ *Cole v. Van Riper*, supra; *Bressler v. Kent*, supra.

⁶⁰ *Naylor v. Field*, supra.

⁶¹ *Naylor v. Field*, supra; *Harding v. Cobb*, 47 Miss. 599; *Beard v. Dedolph*, 29 Wis. 136; ante, p. 143.

⁶² *Swift v. Luce*, 27 Me. 285; *Brown v. Fifield*, 4 Mich. 322; *Scott v. Scott*, 13 Ind. 225; *Moore v. Cornell*, 68 Pa. St. 320.

as in many states, that married women may hold, enjoy, and possess their separate property as if sole, they may make all such contracts as are necessarily incident to such enjoyment.⁶³ Under such a statute a married woman has been held to have the power to contract for labor and materials for the construction of an hotel on her separate real estate, on the ground that the intention of the statute could not be accomplished unless it also removed the common-law disability to the extent of empowering the wife to make all contracts necessary and convenient to the full enjoyment of her estate.⁶⁴

While the courts have generally said that married women's separate property acts, being in derogation of common law, will be strictly construed, this does not mean that the court can refuse to give full effect to their terms. It was said in a leading case, under a statute making it lawful for a feme covert to acquire title to real estate by gift or grant, and to hold it as her separate estate, that the contract of a married woman to assume the payment of a mortgage as part of the purchase money for land conveyed to her was valid; that the law did not intend that she could acquire property without paying for it; and that the power to acquire and hold included the right to do all acts reasonably necessary in acquiring and holding.⁶⁵ As has been said by the Pennsylvania court: "Her power to purchase gives her a right to contract for the payment of the purchase money so far as to charge the property with such incumbrance as may be agreed upon to secure its payment."⁶⁶

Equitable or Legal Jurisdiction.

Contracts which, before the passage of these acts, were binding in equity on the wife's equitable separate estate, are generally binding in equity on the wife's statutory separate estate. While the wife's separate estate is purely a legal one under the statute, it is held in

⁶³ Conway v. Smith, 13 Wis. 140; Cookson v. Toole, 59 Ill. 519; Williams v. Hugunin, 69 Ill. 214; Smith v. Howe, 31 Ind. 233; Lindley v. Cross, Id. 106; Duren v. Getchell, 55 Me. 241; Mahon v. Gormley, 24 Pa. St. 80; Wright v. Blackwood, 57 Tex. 644.

⁶⁴ Conway v. Smith, *supra*.

⁶⁵ Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504. And see, to the same effect, Tiemeyer v. Turnquist, 85 N. Y. 516; Cashman v. Henry, 75 N. Y. 103; Bower's Appeal, 68 Pa. St. 128.

⁶⁶ Bower's Appeal, *supra*.

most states that equity nevertheless has jurisdiction to charge the legal estate under such circumstances as would render it liable if the separate estate were a creation of equity.⁶⁷ "The jurisdiction of a court of equity," it has been said, "over the subject [separate property] does not rest upon the ground that the estate of the wife is an equitable estate merely, but upon the ground that it is her separate estate, which is equitably subject to contracts and engagements entered into by her which are not legally binding upon her personally, and which cannot be enforced by law."⁶⁸ In some states equitable jurisdiction over legal separate property is denied.⁶⁹

Such contracts as can be made by a married woman under express statutory provision, as incident to her separate property, and such contracts as she can make, as necessary to the separate enjoyment of her property, can be enforced in some states by actions at law. The court says in *Conway v. Smith*⁷⁰ that it could not be assumed that the legislature intended to rely on equitable aid to help out the objects of the statute, and that it necessarily follows that the contracts contemplated by the statute can be enforced by legal remedies. It was held in that case that an action at law would lie on a promissory note. And in *Cookson v. Toole*⁷¹ an action at law for work and labor was sustained, the court holding that "the implication of capacity to contract in respect to her separate property, arising under the statute, is an implication of law, and, being an implication of law, and not of equity, the capacity to contract within the scope of the implication is necessarily a legal capacity, and all contracts under it must be legal contracts, cognizable by courts of law." In the leading case of *Yale v. Dederer*,⁷² however, under a similar statute, it

⁶⁷ 3 Pom. Eq. Jur. § 1099; *Yale v. Dederer*, 18 N. Y. 265, 272; *Ballin v. Dillaye*, 37 N. Y. 35; *Perkins v. Elliott*, 23 N. J. Eq. 526; *Levi v. Earl*, 30 Ohio St. 147; *Phillips v. Graves*, 20 Ohio St. 371, 389; *Cox's Adm'r v. Wood*, 20 Ind. 54; *Pond v. Carpenter*, 12 Minn. 430 (Gil. 315); *Hall v. Dotson*, 55 Tex. 520; *Wicks v. Mitchell*, 9 Kan. 80; *Todd v. Lee*, 15 Wis. 365; *Donovan's Appeal*, 41 Conn. 551; *Johnson v. Cummins*, 16 N. J. Eq. 97, 105.

⁶⁸ *Johnson v. Cummins*, *supra*.

⁶⁹ *West v. Laraway*, 28 Mich. 464; *Cain v. Bunkley*, 35 Miss. 119, 145; *Macclay v. Love*, 25 Cal. 367.

⁷⁰ 13 Wis. 125; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241.

⁷¹ 59 Ill. 515; *Todd v. Lee*, 15 Wis. 365.

⁷² 18 N. Y. 265.

was said that the statute does not remove the legal incapacity which prevents a married woman from contracting debts. When married women's contracts can be enforced at law, such remedy has been held in some states not to be exclusive, but cumulative, and that equity has concurrent jurisdiction.⁷³

⁷³ Phillips v. Graves, 20 Ohio St. 371; Mitchell v. Otey, 23 Miss. 236; Johnson v. Cummins, 16 N. J. Eq. 97; 1 Story, Eq. Jur. § 80.

CHAPTER VI.

ANTENUPTIAL AND POSTNUPTIAL SETTLEMENTS.

- 85. Antenuptial Settlements.
- 86. Marriage as a Consideration.
- 87. Settlements Based on Antenuptial Agreements.
- 88. Statute of Frauds.
- 89-90. Postnuptial Settlements.
- 91-92. As against Creditors and Purchasers.

ANTENUPTIAL SETTLEMENTS.

85. An antenuptial settlement or marriage settlement is an agreement entered into before marriage, and in consideration thereof, between an intended husband and wife, or between them and third persons, by which the enjoyment or devolution of property is regulated. A marriage settlement—
- (a) May determine the rights which the husband and wife shall have in his or her own, or in each other's, property.
 - (b) But, as a rule, it cannot otherwise vary the rights and obligations of husband and wife, arising from the marriage relation.

The term "settlement" is ordinarily applied to agreements entered into before marriage, and in contemplation and consideration thereof, by which the enjoyment and devolution of property is regulated. In its broadest sense, however, the term applies also to settlements or agreements made after marriage. In the former case they are called "antenuptial settlements," and in the latter case they are called "postnuptial settlements." The term "marriage settlement" is often applied to agreements entered into after marriage,—that is, to postnuptial settlements; but this use of the term is improper. A marriage settlement is essentially an agreement entered into before marriage, and in consideration thereof.

The term therefore includes antenuptial settlements only. Marriage settlements may have various objects in view. Ordinarily, the purpose is to alter the interests which the husband and wife would have in their own and in each other's property by the law of the marriage status, and to fix the same according to their own agreement; to preserve property intact in a particular family, or the issue of the contemplated union; or to prevent the dissipation of the property of either party by extravagance. The purpose in most cases is to protect the wife and children against want from the possible loss or dissipation of property by the husband. "These marriage settlements are benignly intended to secure to the wife a certain support in any event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband. They usually proceed from the prudence or foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated."¹

There is no rule of law nor principle of public policy which prevents husband and wife from thus fixing, by an agreement before marriage, the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire therein by virtue of the marriage.² Thus, they may relinquish their distributive shares in each other's estates,³ or the wife may bar her dower, or the husband his curtesy.⁴ The husband may agree that his wife may retain all her own property to her

¹ 2 Kent, Comm. 165; *Tabb v. Archer*, 3 Hen. & M. (Va.) 399; *McLeod v. Board*, 30 Tex. 238; *Crostwaight v. Hutchinson*, 2 Bibb (Ky.) 407.

² 2 Kent, Comm. 163; *Campion v. Cotton*, 17 Ves. 264; *Andrews v. Jones*, 10 Ala. 400; *Tabb v. Archer*, 3 Hen. & M. (Va.) 398; *Boardman's Appeal*, 40 Conn. 169; *Caulk v. Fox*, 13 Fla. 148; *Hanley v. Drumm*, 31 La. Ann. 106; *Peck v. Peck*, 12 R. I. 485; *McLeod v. Board*, 30 Tex. 239, 244; *Woods v. Richardson*, 117 Mass. 276; *Baldwin v. Carter*, 17 Conn. 201.

³ *Glover v. Bates*, 1 Atk. 439; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278; *Adams v. Dickson*, 23 Ga. 406; *McLeod v. Board*, 30 Tex. 238; *Crostwaight v. Hutchinson*, 2 Bibb (Ky.) 407.

⁴ *Charles v. Andrews*, 9 Mod. 151; *Simpson v. Gutteridge*, 1 Madd. 609; *Williams v. Chitty*, 3 Ves. 551; *Selleck v. Selleck*, 8 Conn. 85; *Stilley v.*

sole and separate use, and he may settle his own property on her.⁵ And the devolution of the property of either or both may be regulated.⁶

These objects the law does not regard as contrary to public policy. As a rule, however, aside from the interest which the husband and wife shall take in each other's property, the rights and obligations arising from the marriage relation cannot be varied by agreement between husband and wife, or between both or either of them and third persons. A husband, for instance, by merely agreeing to pay his wife a stipulated allowance, cannot always relieve himself of his common-law liability to pay for her necessities, if the allowance is insufficient.⁷ Nor can an arrangement whereby a married woman lives apart from her husband, and has a separate maintenance secured to her, change the legal character of her relations to her husband, so as to enable her to contract and be sued as a *feme sole*.⁸ Nor can a settlement whereby all a wife's property is conveyed in trust for her separate use,⁹ nor an express agreement that the husband shall not be liable,¹⁰ relieve him from his common-law liability for her antenuptial debts. And an antenuptial agreement by which a husband agreed not to change his domicile has been held void, as an attempt to abridge a legal right of the husband incident to the marriage status.¹¹

MARRIAGE AS A CONSIDERATION.

86. Marriage is a sufficient consideration to support an antenuptial settlement

(a) In favor of

Folger, 14 Ohio, 610; *Jacobs v. Jacobs*, 42 Iowa, 600; *Naill v. Maurer*, 25 Md. 532.

⁵ *Baldwin v. Carter*, 17 Conn. 201.

⁶ *Davies v. Davies*, 1 Law J. Ch. (N. S.) 31; *Hunter v. Bryant*, 2 Wheat. 32; *Camp v. Smith*, 61 Ga. 449; *Jacobs v. Jacobs*, 42 Iowa, 600; *Bank of Greensboro v. Chambers*, 30 Grat. (Va.) 202.

⁷ *Nurse v. Craig*, 2 Bos. & P. (N. R.) 148; ante, p. 124.

⁸ *Marshall v. Rutton*, 8 Term R. 545; *Prentiss v. Paisley* (Fla.) 7 South. 56.

⁹ *Powell v. Manson*, 22 Grat. (Va.) 177, 193.

¹⁰ *Harrison v. Trader*, 27 Ark. 288; ante, p. 128.

¹¹ *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163; ante, p. 53.

- (1) The husband and wife and their issue, or the issue of a former marriage.
 - (2) Collateral relatives, where it is clear that it was intended to provide for them.
 - (3) But not in favor of mere strangers.
- (b) As against
- (1) The settlor.
 - (2) The settlor's creditors, in favor of an innocent beneficiary, though the settlor was insolvent, and intended to defraud his creditors.
 - (3) But not as against creditors if the beneficiary participated in the fraudulent intent, or knew of it.

Nothing is better settled than that marriage is a sufficient consideration to support an antenuptial settlement as against the settlor.¹² It has been said by Mr. Justice Story to be a consideration "of the highest value,"¹³ and by Chancellor Kent to be "the highest consideration in law."¹⁴ In a Massachusetts case it was said that an obligatory agreement to marry is an equally high consideration, not differing substantially from the consideration of marriage, and sufficient to support an antenuptial settlement, though the settlor's death prevented the marriage.¹⁵ In order that a promise to marry, not followed by the marriage contemplated, may support a settlement, the settlement must have been made in consideration of the promise; and the settlement should show very clearly that such was the intention of the parties, to authorize a court to hold that the settlement was not conditional upon a marriage actually taking place. It has been held that, where the agreement to marry is rescinded by the parties, there is an entire failure of consideration.¹⁶ The same should be true where the agreement is discharged by the death of one of the parties.

¹² Valzey, Set. Prop. 70; Ex parte Marsh, 1 Atk. 158; Nairn v. Prowse, 6 Ves. 752; Magniac v. Thompson, 7 Pet. 348.

¹³ Magniac v. Thompson, supra.

¹⁴ Sterry v. Arden, 1 Johns. Ch. (N. Y.) 271.

¹⁵ Smith v. Allen, 5 Allen (Mass.) 454.

¹⁶ Essery v. Cowlard, 26 Ch. Div. 191.

It is well settled that the marriage will support a settlement in favor of the husband and wife and their issue,¹⁷ or the children of a former marriage.¹⁸ It seems equally well settled that it will not support a settlement in favor of entire strangers.¹⁹ Whether it will support a settlement in favor of collateral relatives is a question upon which the authorities are conflicting. In England, by the weight of authority, the general rule is to exclude them.²⁰ But there are cases which recognize an exception to the general rule, and hold that a settlement will be supported even in favor of collateral relatives if there is something over and above the consideration flowing from the immediate parties to the settlement, from which it can be inferred that the collateral relatives were intended to be provided for, and that, if the provision in their behalf had not been agreed to, the superadded consideration would not have been given.²¹ This exception, and even a broader one, it seems, has been recognized by the supreme court of the United

¹⁷ 1 Vaizey, Set. Prop. 141; Schouler, *Husb. & W.* § 349; *Trevor v. Trevor*, 1 P. Wms. 622; *Herring v. Wickham*, 29 Grat. (Va.) 628; *Vason v. Bell*, 53 Ga. 416; *Tabb v. Archer*, 3 Hen. & M. (Va.) 398.

¹⁸ *Gale v. Gale*, 6 Ch. Div. 144; *Michael v. Morey*, 26 Md. 239; *Vason v. Bell*, supra. In *Michael v. Morey*, supra, it was said: "The consideration of marriage is a valuable consideration, and not only sustains covenants in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage, as a moral consideration. The children are regarded as purchasers. They may enforce the obligations of the contracting parties, notwithstanding the nonperformance of mutual stipulations on the other side, unless they are conditional and dependent covenants. Although the defaulting party may not, in some instances, be allowed to enforce the articles specifically, the children, the innocent objects of parental solicitude and care, are entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on one side. These reasons include as well the issue of a former as a subsequent marriage. There can be no equity in inflicting upon the only child of a former marriage, dependent on its mother for support, in whose behalf provision was made in anticipation of a second marriage, the penalty of forfeiture, because of the subsequent misconduct of her mother."

¹⁹ *Sutton v. Chetwynd*, 3 Mer. 249; *Merritt v. Scott*, 6 Ga. 563.

²⁰ 1 Vaizey, Set. Prop. 76, 140.

²¹ *Vernon v. Vernon*, 2 P. Wms. 594; *Stephens v. Trueman*, 1 Ves. Sr. 73; *Edwards v. Countess of Warwick*, 2 P. Wms. 171. See *Neves v. Scott*, 9 How. 196.

States, in *Neves v. Scott*,²² where it is said, after reviewing some of the English cases: "The result of all the cases, I think, will show that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the considerations upon which it is founded. The consideration will extend through all the limitations for the benefit of the remotest persons provided for consistent with law."²³

As against Creditors.

The statute of 13 Eliz. c. 5, provides that all conveyances and dispositions of property, real or personal, made with the intent to delay, hinder, or defraud creditors, shall be void as against them; and the statute of 27 Eliz. c. 4, declares void all conveyances of real property made with the intent of defeating subsequent purchasers. These statutes are merely declaratory of the common law,²⁴ and have been thus accepted in some of our states, while in others they have been expressly adopted by statute, or re-enacted.²⁵ Both of these statutes contain provisos that nothing therein contained shall defeat any estate or interest made on good consideration, and bona fide to any person not having at the time notice of any fraudulent purpose.

Since marriage is a valuable consideration, antenuptial settlements are not fraudulent as against creditors and purchasers, under these statutes, where they are made in favor of innocent parties. A marriage settlement, even of all of the settlor's property, in favor of the husband or wife and their issue, will always be supported as against creditors of the settlor or purchasers, if the beneficiaries are innocent of any fraud; and it can make no difference that the

²² 9 How. 196; 13 How. 268.

²³ And see *Tabb v. Archer*, 3 Hen. & M. (Va.) 398.

²⁴ 4 Kent, Comm. 462; May, *Fraud. Conv.* 3; *Rickards v. Attorney General*, 12 Clark & F. 30, 42; *Hamilton v. Russell*, 1 Cranch, 309.

²⁵ 4 Kent, Comm. 463; May, *Fraud. Conv.* 2.

settlor was insolvent, or his intent fraudulent, if the beneficiaries are innocent.²⁶ A settlement by a husband in favor of his wife has been upheld as against his creditors notwithstanding false recitals that the property was the wife's, because it did not appear that she knew that his circumstances were such as to make the settlement a fraud on any one.²⁷ As has been said by Mr. Justice Story: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settlor alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be, affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and, from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is bona fide, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors."²⁸ It can make no difference, in so far as the validity of an antenuptial settlement by a husband on his wife and children is concerned, that, before the settlement and marriage, he lived with the woman in fornication.²⁹

If in any case, on the other hand, there is an intent both on the part of the settlor and of the beneficiary to delay and defraud creditors, or if there is such an intent on the part of the settlor, and the beneficiary knows of it, the settlement will not be upheld.³⁰

²⁶ *Campion v. Cotton*, 17 Ves. 272; *Magniac v. Thompson*, 7 Pet. 367; *Herring v. Wickham*, 29 Grat. (Va.) 628; *Serry v. Arden*, 1 Johns. Ch. (N. Y.) 261; *Smith v. Allen*, 5 Allen (Mass.) 454; *Andrews v. Jones*, 10 Ala. 400; *Jones' Appeal*, 62 Pa. St. 324; *Bunnel v. Witherow*, 29 Ind. 123; *Prewitt v. Wilson*, 103 U. S. 22; *Bridge v. Eggleston*, 14 Mass. 245.

²⁷ *Campion v. Cotton*, 17 Ves. 272.

²⁸ *Magniac v. Thompson*, 7 Pet. 348, 393.

²⁹ *Coutts v. Greenhow*, 2 Munf. (Va.) 363, reversing *Greenhow v. Coutts*, 4 Hen. & M. (Va.) 485. And see *Herring v. Wickham*, 29 Grat. (Va.) 628.

³⁰ *Magniac v. Thompson*, 7 Pet. 348; *Davidson v. Graves*, Riley, Eq. (S. C.) 232; *Colombine v. Penhall*, 1 Smale & G. 228, 257; *Bulmer v. Hunter*, L. R. 8 Eq. 46.

"Fraud may be imputable to the parties either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, after such notice, into execution."³¹ Of course an antenuptial agreement that the wife's property shall remain hers is not defeated by the fact that the object of the agreement is to defeat the husband's creditors.³²

SETTLEMENTS BASED ON ANTENUPTIAL AGREEMENTS.

87. The consideration of marriage supports a settlement made after marriage, if in pursuance of a valid antenuptial agreement in compliance with the statute of frauds.

A settlement, though not made until after marriage, is supported by the consideration of marriage as fully as if made before marriage, if it is made in pursuance of a valid antenuptial agreement.³³ Prior to the enactment of the statute of frauds, which, as will presently be seen, requires all agreements in consideration of marriage to be in writing,³⁴ it was held that a settlement made after marriage, in pursuance of an antenuptial agreement, was valid, though the agreement was not in writing.³⁵ Since the enactment of the statute, however, all agreements in consideration of marriage must be evidenced by writing before the court can recognize them as having any effect; and it follows that an antenuptial agreement must be in writing, in order that a settlement made in pursuance thereof after marriage may be upheld.³⁶

³¹ Per Story, J., in *Magniac v. Thompson*, 7 Pet., at page 394.

³² *Baldwin v. Carter*, 17 Conn. 201.

³³ 1 *Valzey*, Set. Prop. 72; *Tawney v. Crowther*, 3 Brown, Ch. 318; *Coles v. Trecothick*, 9 Ves. 250; *Jason v. Jervis*, 1 Vern. 284, 286; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Sir Ralph Bovy's Case*, 1 Vent. 193; *Tabb v. Archer*, 3 Hen. & M. (Va.) 398.

³⁴ Post, p. 158.

³⁵ *Griffin v. Stanhope*, Cro. Jac. 454; *Sir Ralph Bovy's Case*, 1 Vent. 193.

³⁶ *Montacute v. Maxwell*, 1 P. Wms. 618, 1 Strange, 236; *Dundas v. Dutens*, 1 Ves. Jr. 196; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Tawney v. Crowther*, 3 Brown, Ch. 263; *Coles v. Trecothick*, 9 Ves. 250; *Lloyd v. Fulton*,

STATUTE OF FRAUDS.

88. Under the statute of frauds, an agreement in consideration of marriage must be evidenced by writing, or it cannot be proven or recognized by the courts.

The statute of frauds and perjuries (29 Car. II. c. 3, § 17) provides that "no action shall be brought whereby * * * to charge any person upon any agreement made upon consideration of marriage, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This statute has been substantially re-enacted in this country.

The statute applies to all agreements for which a marriage is the consideration, such as a promise to pay money, or to make a settlement of property if a marriage is consummated, and so includes marriage settlements or agreements therefor.⁸⁷ The statute, therefore, applies to an agreement by a man and woman in con-

91 U. S. 479; *Bradley v. Saddler*, 54 Ga. 681; *Finch v. Finch*, 10 Ohio St. 501; *Henry v. Henry*, 27 Ohio St. 121; *Flenner v. Flenner*, 29 Ind. 569; *Izard v. Middleton*, 1 Bailey, Eq. (S. C.) 228.

⁸⁷ *Clark*, Cont. 101, 102; *Tawney v. Crowther*, 3 Brown, Ch. 263; *Coles v. Trecothick*, 9 Ves. 250; *Caton v. Caton*, 1 Ch. App. 137; *Ogden v. Ogden*, 1 Bland (Md.) 284; *Crane v. Gough*, 4 Md. 316; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Henry v. Henry*, 27 Ohio St. 121; *Finch v. Finch*, 10 Ohio St. 507; *Flenner v. Flenner*, 29 Ind. 564; *Caylor v. Roe*, 99 Ind. 1; *Lloyd v. Fulton*, 91 U. S. 479; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. 1; *Chase v. Fitz*, 132 Mass. 359; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397; *Mallory's Adm'rs v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737; *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; ante, p. 150. In *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, it was held that the statute did not apply to an oral agreement between a man and woman, by which the man was to provide for the comfort and support of the woman during life, pay her debts, take care of, manage, and improve certain land, so as to make it productive, and to that end that the parties should marry and live together on the land, which should be conveyed by the woman to the man in fee simple. The court thought that the consideration for the conveyance of the land was the provision for the support and comfort of the woman and not the marriage.

templation of marriage that each shall retain the title to his or her own property, and dispose of it as if unmarried;³⁸ or that the survivor shall take no interest in the property of the other;³⁹ or that the survivor shall take certain property.⁴⁰

The memorandum required by the statute of frauds does not go to the existence of the contract, but is evidence only. A parol agreement within the statute exists. It simply cannot be proven, and is unenforceable. For this reason, it is held that the note or memorandum in writing need not be made at the time the contract is made, but may be made at any time before it is sought to enforce it. This applies to other contracts within the statute of frauds;⁴¹ and there is no ground upon which the courts are authorized to make an exception in the case of agreements in consideration of marriage. It has therefore been held that a verbal agreement in consideration of marriage is taken out of the operation of the statute by being reduced to writing after the marriage.⁴² As has been shown, a settlement made after marriage, in pursuance of a valid antenuptial agreement, is supported by the consideration of marriage, but cannot be upheld unless there is written evidence of the antenuptial agreement, since the agreement cannot be proved by parol. Some of the courts have intimated, but not decided, that it is not sufficient in these cases for the written evidence of the antenuptial agreement to be supplied by recitals in the instrument by which the settlement in pursuance thereof is made after marriage.⁴³ Under the principle stated above, however, such a recital may be sufficient.⁴⁴

The statute does not apply to a promise to marry, the consideration for which is, not the marriage, but the promise of the other party. *Clark v. Pendleton*, 20 Conn. 495; *Clark*, Cont. 101.

³⁸ *Mallory's Adm'rs v. Mallory's Adm'r*, supra.

³⁹ *Carpenter v. Cornings*, 51 Hun, 638, 4 N. Y. Supp. 947.

⁴⁰ *Hannon v. Hounihan*, supra. And see *White v. Bigelow*, 154 Mass. 593, 23 N. E. 904; *Adams v. Adams*, 17 Or. 247, 20 Pac. 633.

⁴¹ *Clark*, Cont. 116, 128, and cases there cited.

⁴² *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397.

⁴³ Dictum in *Randall v. Morgan*, 12 Ves. 67, and in *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481.

⁴⁴ Dictum in *Montacute v. Maxwell*, 1 P. Wms. 618, 1 Strange, 236, and in *Dundas v. Dutens*, 1 Ves. Jr. 196.

The note or memorandum in writing required by the statute need not be a formal written agreement. Any writing which shows all the terms of the agreement, the subject-matter, and the parties, and which is signed by the party to be charged, or his or her duly-authorized agent, is sufficient, since written evidence of the agreement is all that is required. There is no difference in this respect between this kind of an agreement and any other agreement within the statute.⁴⁵ In a late case, a letter to a mother, proposing to marry her daughter, shown to the latter, and stating that the writer would convey certain land to the daughter when they should be married, was held a sufficient memorandum of the agreement to convey.⁴⁶ The memorandum may consist entirely of correspondence. It may consist of any number of separate papers, provided the papers refer to and identify each other. The most informal kind of a memorandum will suffice if it shows the agreement and its terms.⁴⁷

The marriage of the parties is not such part performance as will, even in equity, take a parol antenuptial agreement out of the operation of the statute.⁴⁸

POSTNUPTIAL SETTLEMENTS.

89. At common law, contracts, gifts, and conveyances, made between husband and wife directly, and without the intervention of trustees or third persons, are void.

90. In equity, the common-law rule does not apply fully; but

- (a) Contracts between husband and wife will be supported, where they would be good at law if made with trustees for the wife.

⁴⁵ See Clark, Cont. 114-125, where the sufficiency of the memorandum required by the statute is discussed at length, and the cases on the subject are collected.

⁴⁶ North Platte Milling & Elevator Co. v. Price (Wyo.) 33 Pac. 634.

⁴⁷ Hammersley v. De Biel, 12 Clark & F. 45; Clark, Cont. 114.

⁴⁸ Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157; Johnstone v. Mappin, 60 Law J. Ch. 241; Flenner v. Flenner, 29 Ind. 564; Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. 810.

(b) Gifts by the husband to the wife are good as between the parties, where there is an irrevocable gift to some person as trustee for the wife, or where the husband divests himself of the property, and agrees to hold as trustee for the wife.

(c) Conveyances by the husband directly to the wife are good as between the parties, when a just and reasonable provision for the wife.

Postnuptial settlements include not only formal settlements made by husband or wife or third persons, but also all transfers of real or personal property made between husband and wife.

At Common Law.

By reason of the common-law idea of the unity of husband and wife, they cannot, at common law, enter into any valid contract with each other.⁴⁹ Nor, apparently for the same reason, does the common law recognize as having any validity whatever, even as between the parties themselves, a gift of personal property,⁵⁰ or a conveyance of real property,⁵¹ directly between husband and wife. Such a gift or conveyance is a mere nullity. "If any principle of common law is settled and perfectly at rest, it seems to be this: that a husband cannot convey an estate by deed to his wife."⁵² It is equally well settled that a wife cannot at common law make a conveyance directly to her husband, nor can they effect this purpose by joining in a deed to him.⁵³

Of course, even at common law, a husband can make a valid contract with trustees, or a valid gift of personalty or conveyance of real property to trustees for the benefit of his wife, provided he does not commit a fraud upon his creditors. The device by

⁴⁹ *Barron v. Barron*, 24 Vt. 375.

⁵⁰ *Co. Litt.* 187b; *Kitchen v. Bedford*, 13 Wall. 413; *Manny v. Rixford*, 44 Ill. 129.

⁵¹ *Co. Litt.* 187b, 3a, 112a; *Beard v. Beard*, 3 Atk. 72; *Phillips v. Barnet*, 1 Q. B. Div. 440; *Voorhees v. Presbyterian Church*, 17 Barb. (N. Y.) 103; *Martin v. Martin*, 1 Me. 394; *Edgerly v. Whalan*, 106 Mass. 307.

⁵² *Martin v. Martin*, *supra*.

⁵³ *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423; *Sims v. Ricketts*, 35 Ind. 181; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540.

which a husband usually conveyed land to his wife at common law was by conveying it to some third person, and having him convey to the wife. Such conveyances are valid.⁵⁴ By a similar circuitry, a wife could convey her land to her husband. While she could not convey to him directly, either by executing the conveyance alone or by joining with him in a conveyance, they could accomplish the purpose by joining in a conveyance to a third person, and having the grantee reconvey to the husband.⁵⁵ In such cases the wife must have acted freely, and not under coercion or undue influence by the husband.⁵⁶ There is no presumption of undue influence,⁵⁷ but the court will scrutinize the transaction closely, and, if any undue influence appears to have been exercised, set the conveyances aside.

In Equity.

The rule in equity does not follow the common law. In some cases a court of equity will recognize and enforce contracts and conveyances entered into directly between husband and wife, without the intervention of trustees. The general rule, as laid down by the Vermont court, is that, whenever a contract would be good at law if made with trustees for the wife, it will be sustained in equity, though made without the intervention of trustees.⁵⁸ So, in equity, a gift or conveyance by the husband directly to the wife will be upheld, in certain cases, by holding the husband as trustee for the wife. Equity will uphold a clear, irrevocable gift by a husband to his wife, either with or without the intervention of trustees;⁵⁹

⁵⁴ *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540.

⁵⁵ *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540.

⁵⁶ *Jackson v. Stevens*, 16 Johns. (N. Y.) 110; *Shepperson v. Shepperson*, 2 Grat. (Va.) 501.

⁵⁷ *Scarborough v. Watkins*, *supra*.

⁵⁸ *Barron v. Barron*, 24 Vt. 375. And see 2 Story, Eq. Jur. § 1372; 2 Kent, Comm. 166; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57; *Slanning v. Style*, 3 P. Wms. 334; *Arundell v. Phipps*, 10 Ves. 146; *Wallingsford v. Allen*, 10 Pet. 583; *Sims v. Rickets*, 35 Ind. 181; *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537; *Maraman's Adm'r v. Maraman*, 4 Metc. (Ky.) 88; *Putnam v. Bicknell*, 18 Wis. 333; *Huber v. Huber's Adm'r*, 10 Ohio, 371; *Simmons v. McElwain*, 26 Barb. (N. Y.) 419; *Wilder v. Brooks*, 10 Minn. 50 (Gil. 32); *Stocket v. Holliday*, 9 Md. 480; *Bowie v. Stonestreet*, 6 Md. 418.

⁵⁹ 1 Lewin, Trusts, 68; 2 Story, Eq. Jur. § 1375; *Lucas v. Lucas*, 1 Atk. 270; *Hutchins v. Dixon*, 11 Md. 29; *Wallingsford v. Allen*, 10 Pet. 583;

but the gift must be clear and complete. It is not sufficient to show an intention to give, but the intention must have been carried into effect.⁶⁰

In the leading case of *Wallingsford v. Allen*,⁶¹ a husband and wife having separated, and alimony having been decreed against him, he gave her, in discharge thereof, certain personal property. After her death he claimed the same. The court said, in rejecting his claim: "Every feature of the agreement is an appeal to have it tested by those principles of equity which have been applied to maintain a separate interest in women, acquired from their husbands during coverture, whether the same were made by the intervention of trustees or not, when the transfer was fairly made, upon a meritorious or valuable consideration. Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution before it will confirm them. But it does sustain them when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife. Where the consideration for the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family, or which has been appropriated by him to his uses; where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use,—either case equity will sustain, though no trustee has been interposed to hold for the wife's use."

McLean v. Longlands, 5 Ves. 78; *Mews v. Mews*, 15 Beav. 529; *Deming v. Williams*, 26 Conn. 226; *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Grant v. Grant*, 34 Law J. Ch. 641.

⁶⁰ *Cotteen v. Missing*, 1 Madd. 176; *Kekewich v. Manning*, 1 De Gex. M. & G. 188; *Jennings v. Davis*, 31 Conn. 134; *George v. Spencer*, 2 Md. Ch. 353. In *Grant v. Grant*, 34 Law J. Ch. 641, it was held that delivery is not necessary, for possession of the wife is that of her husband, and that present words of gift, without any further act, are sufficient in equity to constitute the husband trustee for the wife. But in *Re Breton's Estate*, 17 Ch. Div. 416, it was held that such a gift could not be supported; that this was an attempt to make a legal transfer, and therefore, under the rule of *Milroy v. Lord*, 8 Jur. (N. S.) 809, it could not operate as a declaration of trust. See, also, *In re Pierce*, 7 Biss. 426, Fed. Cas. No. 11,139.

⁶¹ 10 Pet. 583.

Conveyances of real estate from the husband to the wife directly, without the intervention of a trustee, though void at law, are upheld in equity, as between the parties, where they are a just and suitable provision for the wife.⁶² In an Indiana case it was said in regard to conveyances of real estate, as was said by the supreme court of the United States⁶³ in regard to gifts of personalty, that "a direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: (1) Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of her family, or which has been appropriated by him to his uses; (2) where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate and exclusive use of his wife."⁶⁴ Of course, if the transfer of personalty, or conveyance of realty, directly from husband to wife, is supported by a valuable consideration, there is all the more reason for sustaining it in equity.⁶⁵

It has been held in New York that a conveyance directly from a wife to her husband is not only void in law, but will not even be sustained in equity.⁶⁶

SAME—AS AGAINST CREDITORS AND PURCHASERS.

91. Postnuptial voluntary settlements, or gifts and conveyances between husband and wife, where the husband is indebted, are held, as against existing creditors, under the statute of 13 Eliz. c. 5, and

⁶² *Sims v. Rickets*, 35 Ind. 181; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57; *Putnam v. Bicknell*, 18 Wis. 333; *Jones v. Clifton*, 101 U. S. 225; *Crooks v. Crooks*, 34 Ohio St. 610, 615; *Barron v. Barron*, 24 Vt. 375; *Waterman v. Higgins*, 28 Fla. 660, 10 South. 97; *Huber v. Huber's Adm'r*, 10 Ohio, 371; *Simmons v. McElwain*, 26 Barb. (N. Y.) 419; *Wilder v. Brooks*, 10 Minn. 50 (Gil. 32).

⁶³ *Wallingsford v. Allen*, 10 Pet. 583.

⁶⁴ *Sims v. Rickets*, *supra*.

⁶⁵ *Wallingsford v. Allen*, *supra*.

⁶⁶ *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423. But see *Sims v. Rickets*, 35 Ind. 181.

similar statutes in this country, declaring conveyances of real estate and transfers of personal property void when made with intent to defraud creditors,

- (a) Conclusively fraudulent and void in some states.
- (b) Prima facie fraudulent and void in England and in most states.

92. Postnuptial and voluntary conveyances from husband to wife, where the husband is indebted, are held, as against subsequent purchasers, under the statute of 27 Eliz. c. 4, and similar statutes in this country, declaring void as against subsequent purchasers conveyances made with the intention of defeating them,

- (a) Conclusively fraudulent and void in England.
- (b) Prima facie fraudulent and void in this country.

While gifts and conveyances between husband and wife may be perfectly good in equity as between the parties themselves, they may be invalid as against creditors and purchasers. Postnuptial settlements, or gifts and conveyances between husband and wife, differ from antenuptial settlements in the matter of consideration. Antenuptial settlements are supported by the consideration of marriage, but postnuptial settlements are not, for the marriage is past. The consideration of marriage supports an antenuptial settlement as against creditors and purchasers; but, as it is wanting in a postnuptial settlement, such a settlement, unless it is supported by some other valuable consideration, may be attacked as voluntary and fraudulent, under the statutes of 13 and 27 Eliz. and similar statutes enacted in this country. As we have seen,⁶⁷ the statute of 13 Eliz. c. 5, declares all conveyances and dispositions of property, real or personal, made with intent to defraud creditors, to be null and void as against them; and the statute of 27 Eliz. c. 4, declares void, as against subsequent purchasers of the same lands, tenements, or other hereditaments, all conveyances, etc., made with the intention of defeating them, or containing a

⁶⁷ Ante, p. 155.

power of revocation. Both of these statutes contain provisos that nothing therein contained shall defeat any estate or interest, made on good consideration and bona fide, to any person not having at the time notice of any fraudulent purpose. A voluntary settlement on his wife, after marriage, by one who is indebted, has been held in some of the states to be conclusively fraudulent as against existing creditors, regardless of the extent of the indebtedness or the amount of the settlement or the circumstances of the debtor.⁶⁸ This rule found support in the earlier English cases, where it was said that all voluntary conveyances were fraudulent, excepting "where the person making them is not indebted at the time."⁶⁹ In the later English cases, however, it is held that not every indebtedness will render a voluntary conveyance fraudulent;⁷⁰ that being indebted is only one circumstance from which evidence of the intention to defraud may be drawn;⁷¹ that, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts an amount without which the debts cannot be paid, then the court may infer that the settlor intended to delay his creditors.⁷² The prevailing doctrine in this country is in accord with the later English cases, namely, that a voluntary postnuptial settlement is only prima facie fraudulent as against existing creditors, and that this presumption may be rebutted by showing that the settlement was reasonable, and not disproportionate to the husband's means, taking into view his debts and situation, and that there was no intent, actual or constructive, to defraud creditors.⁷³ While, in England, a voluntary postnuptial settlement of real estate is held conclusively void as against a subsequent purchaser, even where he

⁶⁸ *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Annin v. Annin*, 24 N. J. Eq. 184, 191.

⁶⁹ *Russel v. Hammond*, 1 Atk. 13.

⁷⁰ *Skarf v. Soulby*, 1 Macn. & G. 374.

⁷¹ *Richardson v. Smallwood*, Jac. 552.

⁷² *Freeman v. Pope*, 5 Ch. App. 538. See May, *Fraud. Conv.* 35, for a full discussion of English cases.

⁷³ *Kehr v. Smith*, 20 Wall. 31, 35; *Leavitt v. Leavitt*, 47 N. H. 329; *Woolston's Appeal*, 51 Pa. St. 452; *Reynolds v. Lansford*, 16 Tex. 287; *Wilson v. Buchanan*, 7 Grat. (Va.) 334, 338.

has notice of the prior deed,⁷⁴ in this country it has been held that the subsequent sale is only presumptive evidence of fraud.⁷⁵ Post-nuptial settlements made for a valuable consideration, like ante-nuptial settlements which are supported by the consideration of marriage, fall within the provisos of the statutes of 13 and 27 Eliz., which except bona fide purchasers for value, and are therefore good as against both creditors and subsequent purchasers, in favor of a wife taking innocently.⁷⁶

⁷⁴ Doe v. Manning, 9 East, 59; Evelyn v. Templar, 2 Brown, Ch. 148.

⁷⁵ 4 Kent, Comm. 464; Cathcart v. Robinson, 5 Pet. 280.

⁷⁶ Ante, pp. 155, 165; Macq. Husb. & W. 279; Magniac v. Thompson, 7 Pet. 348; Simmons v. McElwain, 26 Barb. (N. Y.) 419; Bullard v. Briggs, 7 Pick. (Mass.) 533.

CHAPTER VII.

SEPARATION AND DIVORCE.

- 93-95. Agreements of Separation.
- 96. Divorce, or Judicial Separation.
- 97. Jurisdiction to Grant Divorce.
- 98-103. Grounds for Divorce.
 - 98. Adultery.
- 99-101. Cruelty.
 - 102. Desertion.
- 103. Miscellaneous Other Grounds.
- 104-108. Defenses in Suits for Divorce.
 - 104. Connivance.
 - 105. Collusion.
- 106, 107. Condonation.
 - 108. Recrimination.
- 109. Legislative Divorce.

AGREEMENTS OF SEPARATION.

- 93. Agreements of separation between husband and wife are valid if the separation has actually taken place at the time of the agreement, or immediately follows it; but it is otherwise if a future separation is contemplated.
- 94. The agreement to live separately will not be enforced, but only the provisions for maintenance, and other collateral engagements.
- 95. If the parties live together again, the agreement is rescinded, and the parties restored to their full marital rights.

At one time the courts refused to countenance any agreement between husband and wife to live separately, without regard to whether the agreement contemplated an immediate separation or a separation in the future, and without regard to the cause of the separation. All agreements for a separation were held void as

against public policy, because in derogation of the marriage relation. "This court," once said Lord Stowell, "considers a private separation as an illegal contract, implying a renunciation of stipulated duties; a dereliction of those mutual offices which the parties are not at liberty to desert; an assumption of a false character in both parties, contrary to the real status personæ, and to the obligations which both of them have contracted in the sight of God and man, to live together 'till death do them part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved."¹

There has, however, been a complete change in the law in this respect in England, and agreements to live separately are sustained by the English courts to-day even to the extent of enforcing specific performance of the agreement to live apart. This was caused by a change in judicial opinion as to the demands of public policy. As was said by Jessel, M. R.: "A change came over judicial opinion as to public policy. Other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequences might be that they would live separately."² Since a married woman could, in a suit for divorce, sue or defend in her own name, it was held that she could compromise such suit, and that, since she could compromise a suit for divorce already instituted, she might compromise the difference with her husband before the commencement of litigation, by agreeing to live separately, on certain terms providing for her maintenance and the custody of her children.³

The courts in this country have taken the same view. It may be laid down as a general rule that the courts will enforce covenants or

¹ *Mortimer v. Mortimer*, 2 Hagg. Const. 310.

² *Besant v. Wood*, 12 Ch. Div. 605; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Hunt v. Hunt*, 4 De Gex, F. & J. 233; *Marshall v. Marshall*, 27 Wkly. Rep. 399; *Hart v. Hart*, 18 Ch. Div. 670.

³ *Besant v. Wood*, 12 Ch. Div. 605; *McGregor v. McGregor*, 20 Q. B. Div. 529.

promises in agreements of separation relating to the maintenance of the wife and other collateral engagements, provided the separation has actually taken place at the time of the agreement, or immediately follows the agreement.⁴ But an agreement having in view a separation in the future is altogether void, as against public policy, and it is immaterial whether they are made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest."⁵ "The distinction," it has been said, "rests upon the following ground: An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still, that state of things is abnormal, and not to be contemplated beforehand. 'It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.' Or, in other words, to allow validity to provisions for a future separation would be to allow the parties, in effect, to make the contract of marriage determinable on conditions fixed beforehand by themselves."⁶

⁴ Clark, Cont. 444; *Carson v. Murray*, 3 Paige (N. Y.) 483; *Champlin v. Champlin*, Hoff. Ch. (N. Y.) 55; *Calkins v. Long*, 22 Barb. (N. Y.) 97; *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500; *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111; *Hutton v. Hutton's Adm'r*, 3 Pa. St. 100; *Hitner's Appeal*, 54 Pa. St. 110; *Appeal of Agnew* (Pa. Sup.) 12 Atl. 160; *Com. v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Dutton v. Dutton*, 30 Ind. 452; *Page v. Trufant*, 2 Mass. 159; *Fox v. Davis*, 113 Mass. 255; *Randall v. Randall*, 37 Mich. 563; *Barnes v. Barnes*, 104 N. C. 613, 10 S. E. 304; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84; *Garver v. Miller*, 16 Ohio St. 527; *Bettle v. Wilson*, 14 Ohio, 257; *Thomas v. Brown*, 10 Ohio St. 247; *Loud v. Loud*, 4 Bush (Ky.) 453; *Gaines' Adm'r v. Poor*, 3 Mete. (Ky.) 503; *Wells v. Stout*, 9 Cal. 479; *McCubbin v. Patterson*, 16 Md. 179; *Robertson v. Robertson*, 25 Iowa, 350; *Walker v. Walker's Ex'r*, 9 Wall. 743; *Switzer v. Switzer*, 26 Grat. (Va.) 574; *Harshberger's Adm'r v. Alger*, 31 Grat. (Va.) 52.

⁵ *Hunt v. Hunt*, 4 De Gex, F. & J. 221. And see Clark, Cont. 444, and cases there cited; *Sayles v. Sayles*, 21 N. H. 312; *Adams v. Adams*, 25 Minn. 72; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331; *People v. Mercein*, 8 Paige (N. Y.) 46, 68; *Randall v. Randall*, 37 Mich. 563; *Gaines' Adm'r v. Poor*, 3 Mete. (Ky.) 503; *Durant v. Titley*, 7 Price, 577; *St. John v. St. John*, 11 Ves. 526; *Jee v. Thurlow*, 2 Barn. & C. 547.

⁶ Pol. Cont. 286.

It must be noted that, where the law does enforce an agreement of separation, it does so only as to the provision as to maintenance and other collateral engagements. The courts of this country, at least, will not aid in carrying out such an agreement, in so far as it relates solely to the parties living apart. As was said in a Pennsylvania case: "When the parties have effected the separation, equity will control its incidents, and accomplish its lawful objects. It will compel the husband to pay what he stipulated to pay for the maintenance of the wife, * * * but it will not decree a separation."⁷

An agreement of separation will be considered as rescinded if the parties afterwards cohabit or live together as husband and wife, by mutual consent, for ever so short a time. And in such an event all the provisions of the agreement will cease to operate, and the parties will be restored to all their marital rights to the same extent as if no separation had ever taken place.⁸

DIVORCE OR JUDICIAL SEPARATION.

- 96. Divorce is the legal separation of husband and wife by the judgment of a court. There are two kinds:**
- (a) **It may dissolve the marriage, in which case it is called a divorce "a vinculo matrimonii."**
 - (b) **It may suspend the effect of the marriage only in so far as cohabitation is concerned, in which case it is called a divorce "a mensa et thoro."**

In England the term "divorce" is now applied both to decrees of nullity of marriage and decrees of dissolution. But in this country the term is limited to decrees dissolving, or suspending the effect of, a valid marriage. Divorce means "the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so

⁷ *Smith v. Knowles*, 2 Grant, Cas. (Pa.) 413. And see *McKenna v. Phillips*, 6 Whart. (Pa.) 571; *Randall v. Randall*, 37 Mich. 563; *Collins v. Collins*, Phil. Eq. (N. C.) 153; *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370; *Tourney v. Sinclair*, 3 How. (Miss.) 324; *Rogers v. Rogers*, 4 Paige (N. Y.) 516; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926.

⁸ See *Carson v. Murray*, 3 Paige (N. Y.) 483.

far as concerns the cohabitation of the parties.”⁹ When the divorce is a total dissolution of the marriage relation, it is called a divorce “from the bond of marriage,” or, in the Latin, “a vinculo matrimonii.” Such a divorce dissolves the marriage tie, and releases the parties wholly from their matrimonial obligations. When the divorce merely suspends the effect of the marriage as to cohabitation, it is called a divorce from bed and board, or, in the Latin, “a mensa et thoro.” Such a divorce is partial or qualified. The parties are separated and forbidden to live or cohabit together again, but the marriage itself is not affected.

JURISDICTION TO GRANT DIVORCE.

97. In this country jurisdiction to entertain a suit for divorce is entirely statutory; but, when once conferred, it is exercised as in the English ecclesiastical courts.

In England the only courts which had any jurisdiction to entertain applications for divorce were the ecclesiastical courts, and they only granted divorces a mensa et thoro. Courts of common law and courts of chancery had no jurisdiction at all in this respect. In this country there is no tribunal having the jurisdiction of the ecclesiastical courts. Our courts have jurisdiction to entertain and grant suits for divorce only where such jurisdiction has been expressly conferred upon them by statute.¹⁰

Where such jurisdiction has been conferred by statute, as is the case in most of the states, it is exercised in accordance with the law as administered in the ecclesiastical courts, except in so far as that law has been modified by statute.¹¹

⁹ Black, Law Dict. tit. “Divorce.”

¹⁰ Burtis v. Burtis, Hopk. Ch. (N. Y.) 557; Anon., 24 N. J. Eq. 19.

¹¹ Crump v. Morgan, 3 Ired. Eq. (N. C.) 91, 98; Le Barron v. Le Barron, 35 Vt. 365; Wuest v. Wuest, 17 Nev. 217, 30 Pac. 886; Williamson v. Williamson, 1 Johns. Ch. (N. Y.) 488, 491; Barrere v. Barrere, 4 Johns. Ch. 187, 196; Wood v. Wood, 2 Paige (N. Y.) 108; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554; Burr v. Burr, 10 Paige (N. Y.) 20; Griffin v. Griffin, 47 N. Y. 137.

GROUNDS FOR DIVORCE—ADULTERY.

98. Adultery is the voluntary intercourse of a married person with another than his or her wife or husband, and is almost universally made a ground of divorce.

As has been seen, prior to 1858, in England, it was only the ecclesiastical courts which had jurisdiction to grant divorces. These courts granted divorces on the ground of adultery, but the divorce was only a *mensa et thoro*. The only way in which a divorce a *vinculo matrimonii* could be obtained was, in Catholic England, by dispensation from the pope, and later, in Protestant England, by a bill in parliament. So, in this country, the only way in which a divorce a *vinculo* could be obtained, even on the ground of adultery, was by recourse to the legislature. There are now in England, and in most of our states, statutes making adultery a ground for an absolute divorce a *vinculo matrimonii*. Though to some extent it is otherwise in England, the statutes in this country do not, as a rule, make any distinction in this respect between the rights of the husband and those of the wife. The same acts of adultery which, when committed by the wife, would entitle the husband to a divorce, will entitle the wife to a divorce if committed by the husband. The statutes are not the same in all the states. In some states a single act of adultery is ground for a divorce, while in others there must be a "living in adultery," and in others the adultery must be accompanied by cruelty, desertion, or other aggravating circumstances.

Adultery consists in the voluntary sexual intercourse of a married person with another than his or her wife or husband, whether the other party to the intercourse is married or single. Sexual intercourse under coercion, as in the case of rape¹² or during insanity,¹³ is not adultery, because it is not voluntary. Mistake of fact may prevent an act of intercourse from being adultery; as where a woman

¹² *People v. Chapman*, 62 Mich. 280, 28 N. W. 896.

¹³ *Nichols v. Nichols*, 31 Vt. 328; *Broadstreet v. Broadstreet*, 7 Mass. 474; *Wray v. Wray*, 19 Ala. 522, 33 Ala. 187; *Mims v. Mims*, 33 Ala. 98. But see *Matchin v. Matchin*, 6 Pa. St. 332.

has intercourse with a man under the belief that he is her husband, or where she has married the person with whom she has intercourse under the belief that her husband was dead.¹⁵ Mistake of law, however, is no defense. Belief in the right to have more than one wife would not prevent the intercourse with the latter from being adulterous.¹⁶ And intercourse after a second marriage, when a divorce from a prior marriage is illegal, is adultery, and ground for a divorce from the prior marriage, though there was a bona fide belief in the validity of the divorce.¹⁷

SAME—CRUELTY.

99. Cruelty is made a ground of divorce in most states by statute. The statutes use various terms, as "extreme cruelty," "intolerable cruelty," "cruel and inhuman conduct," conduct rendering it "unsafe and improper" for the parties to cohabit, etc.
100. The general rule is that conduct to come within the statutes must consist in the infliction, or threatened infliction, of bodily harm. This may be
- (a) By personal violence, either actual or threatened and reasonably apprehended.
 - (b) By words or conduct, without personal violence, causing mental suffering, and thereby injuring, or threatening to injure, the health.
101. In some states falsely charging a wife with adultery is held to be cruelty, though unaccompanied by bodily harm; and in a few states it is held generally that bodily injury is not necessary.

¹⁵ Ayl. Par. 226; *Valleau v. Valleau*, 6 Paige (N. Y.) 207. Of course, this does not apply if the intercourse under the second marriage is continued after knowledge that the first spouse is still living. *Mathewson v. Mathewson*, 18 R. I. 456, 28 Atl. 801.

¹⁶ See *Reynolds v. U. S.*, 98 U. S. 145.

¹⁷ *Simonds v. Simonds*, 103 Mass. 572; *Leith v. Leith*, 39 N. H. 20; *McGiffert v. McGiffert*, 31 Barb. (N. Y.) 69. See *Palmer v. Palmer*, 1 Swab. & T. 551.

In most states, by statute, cruelty is made a ground for divorce a vinculo matrimonii or a mensa et thoro. In some it is ground for divorce a mensa et thoro only. Various expressions are found in the statutes of the different states, but they are held to mean substantially the same thing. These expressions are, in most states, "extreme cruelty;" in some, "repeated cruelty;" in others, "cruel or abusive treatment;" "cruel and inhuman treatment, whether practiced by using personal violence or other means;" "cruel treatment, outrages, or excesses, so as to render their living together insupportable;" "cruel and inhuman treatment, or personal indignities, rendering life burdensome;" "intolerable severity;" "such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter." In some states it is declared that "cruelty," within the meaning of the statute, must consist of personal violence. In others it is defined to be "the infliction of grievous bodily injury or grievous mental suffering." In others it is declared that the treatment must be such as to injure health or endanger reason;¹⁸ in others, so cruel as to endanger life.

Although there are some exceptions, due to the peculiar wording of particular statutes, the doctrine almost universally accepted is that cruelty, to be a ground for divorce, must consist of physical cruelty, either direct, or consequential without personal violence. Any conduct which is attended with bodily harm, and which renders it impossible or unsafe to discharge the duties of married life, may constitute cruelty as fully as direct violence.¹⁹ Actual vio-

¹⁸ See *Robinson v. Robinson*, 66 N. H. 600, 23 Atl. 362.

¹⁹ It is cruelty in a husband to refuse his wife the necessities of life when it is in his power to supply them. *Dysart v. Dysart*, 1 Rob. Ecc. 106, 111, 125; *Smedley v. Smedley*, 30 Ala. 714; *Whitacre v. Whitacre*, 64 Mich. 232, 31 N. W. 327; *Eastes v. Eastes*, 79 Ind. 363; *Butler v. Butler*, 1 Pars. Eq. Cas. (Pa.) 329. It is cruelty for a husband to have intercourse with his wife when he knows that he has a venereal disease, and infect her with it; and vice versa. *Collett v. Collett*, 1 Curt. Ecc. 678; *Anon.*, 17 Abb. N. C. 231; *Rehart v. Rehart* (Or.) 25 Pac. 775. So where a husband compels his wife to submit to excessive sexual intercourse, with knowledge of injury to her health. *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966; *Shaw v. Shaw*, 17 Conn. 189; *Youngs v. Youngs*, 33 Ill. App. 223; *Grant v. Grant*, 53 Minn. 181, 54 N. W. 1059. But denial of intercourse is not cruelty on the part of either the husband or the wife. *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773;

lence is not necessary to constitute cruelty. Threats of violence made in earnest, and which indicate an intention to do bodily harm, are sufficient. "The court is not to wait till the hurt is actually done."²⁰ On the other hand, mere threats not intended to be carried out, and not furnishing reasonable grounds for apprehension of bodily injury, are insufficient.²¹ What must be the extent of the violence offered, or what will reasonably excite apprehension, will depend upon the circumstances of each case. The station in life and situation of the parties and all the attendant circumstances will be taken into consideration. A blow between parties in the lower conditions and in the highest stations of life has a very different aspect.²² A single act of cruelty may be so severe as to justify a divorce on the ground of cruelty,²³ but, as a rule, it is not sufficient.²⁴ A single act committed in a sudden passion might not constitute cruelty, when the same act committed as the result of a deliberate, fixed intention to abuse would suffice.²⁵

Cousen v. Cousen, 4 Swab. & T. 164; *Cowles v. Cowles*, 112 Mass. 298; *Magill v. Magill*, 3 Pittsb. R. (Pa.) 25.

²⁰ *Evans v. Evans*, 1 Hagg. Const. 35; *Oliver v. Oliver*, Id. 361, 364; *Mytton v. Mytton*, 11 Prob. Div. 141; *Bailey v. Bailey*, 97 Mass. 373; *Beebe v. Beebe*, 10 Iowa, 133; *Rhame v. Rhame*, 1 McCord Eq. (S. C.) 197; *Whispell v. Whispell*, 4 Barb. (N. Y.) 217; *Kennedy v. Kennedy*, 60 How. Prac. (N. Y.) 151, 73 N. Y. 369; *Graecen v. Graecen*, 2 N. J. Eq. 459; *Hughes v. Hughes*, 19 Ala. 307; *Freeman v. Freeman*, 31 Wis. 235; *Harratt v. Harratt*, 7 N. H. 196.

²¹ *Evans v. Evans*, 1 Hagg. Const. 35; *Eshbach v. Eshbach*, 23 Pa. St. 343; *Close v. Close*, 24 N. J. Eq. 338; *Shell v. Shell*, 2 Sneed (Tenn.) 716; *Coursey v. Coursey*, 60 Ill. 186; *Uhlmann v. Uhlmann*, 17 Abb. N. C. (N. Y.) 236.

²² *Evans v. Evans*, 1 Hagg. Const. 35; *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1, p. 72; *Barrere v. Barrere*, 4 Johns. Ch. (N. Y.) 187; *Kline v. Kline*, 50 Mich. 438, 15 N. W. 541; *Fleytas v. Pigneguy*, 9 La. 419; *Donald v. Donald*, 21 Fla. 571.

²³ *Reeves v. Reeves*, 3 Swab. & T. 139; *French v. French*, 4 Mass. 587; *Miller v. Miller*, 72 Tex. 250, 12 S. W. 167.

²⁴ *Holden v. Holden*, 1 Hagg. Const. 453; *Smallwood v. Smallwood*, 2 Swab. & T. 397; *Fleytas v. Pigneguy*, 9 La. 419; *Lauber v. Mast*, 15 La. Ann. 593; *Jenness v. Jenness*, 60 N. H. 211; *Richards v. Richards*, 1 Grant, Cas. (Pa.) 389. In some states the statute requires "repeated cruelty." *Henderson v. Henderson*, 88 Ill. 248.

²⁵ *Pillar v. Pillar*, 22 Wis. 627; *Cook v. Cook*, 11 N. J. Eq. 195; *Finley v. Finley*, 9 Dana (Ky.) 52; *Moyler v. Moyler*, 11 Ala. 620.

There are some cases which recognize as a ground of divorce, under the statutes, mere mental suffering caused by abusive or unkind treatment.²⁶ And in several states, where the courts do not recognize such a ground generally, they do recognize as cruelty a false accusation of adultery made by a husband against his wife.²⁷ But, by the weight of authority, both in this country and in England, the abusive and unkind treatment must to some extent result in or threaten bodily harm. Mere mental suffering caused by unkind, abusive, or insulting words or conduct is not enough.²⁸ In a leading case Lord Stowell said: "What merely wounds the men-

²⁶ *Carpenter v. Carpenter*, 30 Kan. 744, 2 Pac. 122; *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 299; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566; *Atherton v. Atherton*, 82 Hun. 179, 31 N. Y. Supp. 977; *Waltermire v. Waltermire*, 110 N. Y. 183, 17 N. E. 739. "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine, as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, * * * or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty, under the statute." *Carpenter v. Carpenter*, supra. As the cases cited in the following notes will show, the latter part of the above quotation is not, as it purports to be, in accord with the weight of opinion. It should be noted, in connection with the California cases cited above, that the California statute defines "extreme cruelty" to be the infliction of grievous bodily injury "or grievous mental suffering." See *Barnes v. Barnes*, supra.

²⁷ *Smith v. Smith*, 8 Or. 100; *Eggerth v. Eggerth*, 15 Or. 626, 16 Pac. 650; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Palmer v. Palmer*, 45 Mich. 150, 7 N. W. 760; *Blurock v. Blurock*, 4 Wash. 495, 30 Pac. 637; *Jones v. Jones*, 60 Tex. 451; *Bahn v. Bahn*, 62 Tex. 518; *Clinton v. Clinton*, 60 Mo. App. 296; *Waltermire v. Waltermire*, 110 N. Y. 183, 17 N. E. 739; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996; *Fowler v. Fowler*, 58 Hun. 601, 11 N. Y. Supp. 419. But see *Cheatham v. Cheatham*, 10 Mo. 296.

²⁸ *Evans v. Evans*, 1 Hagg. Const. 35; *Harris v. Harris*, 2 Phillim. 111, 1 Eng. Ecc. R. 204; *Barlee v. Barlee*, 1 Addams, Ecc. 301; *Oliver v. Oliver*, 1 Hagg. Const. 361; *Kirkman v. Kirkman*, Id. 409; *Detrick's Appeal*, 117 Pa. St. 452, 11 Atl. 882; *Shaw v. Shaw*, 17 Conn. 189; *Boggess v. Boggess*, 4 Dana (Ky.) 307; *Daiger v. Daiger*, 2 Md. Ch. 335; *Close v. Close*, 24 N. J. Eq. 338; *Henderson v. Henderson*, 88 Ill. 248; *Moyler v. Moyler*, 11 Ala. 620; *Lucas v. Lucas*, 2 Tex. 112; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Maben v. Maben*,

tal feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent, surely, in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties,—for it may exist on one side as well as on the other,—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and, if this cannot be done, both must suffer in silence. And if it be complained that, by this inactivity of the courts, much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.”²⁹ “The law does not permit courts to sever the marriage bond, and to break up households, merely because parties, from unruly tempers or mutual wranglings, live unhappily together. It requires them to submit to the ordinary consequences of human infirmities and of unwise selections; and the misconduct which will form a good ground for a legal separation must be very serious, and such as amounts to extreme cruelty, entirely subverting the family relations, by rendering the association intolerable.”³⁰ “Although the character of the ill treatment, whether it operates directly upon the

72 Iowa, 658, 34 N. W. 462; Vanduzer v. Vanduzer, 70 Iowa, 614, 31 N. W. 956; Cheatham v. Cheatham, 10 Mo. 296; Disborough v. Disborough (N. J. Ch.) 26 Atl. 852. The use of abusive language may be shown in connection with acts or threats of physical violence, as characterizing them. Dysart v. Dysart, 1 Rob. Ecc. 106; Gibbs v. Gibbs, 18 Kan. 419; Day v. Day, 56 N. H. 316; Farnham v. Farnham, 73 Ill. 497; Kennedy v. Kennedy, 73 N. Y. 369; Johns v. Johns, 57 Miss. 530; Goodrich v. Goodrich, 44 Ala. 670; Thomas v. Thomas, 20 N. J. Eq. 97; Straus v. Straus, 67 Hun, 491, 22 N. Y. Supp. 567.

²⁹ Evans v. Evans, *supra*.

³⁰ Cooper v. Cooper, 17 Mich. 205.

body, or primarily upon the mind alone, and all the attending circumstances are to be considered for the purpose of estimating the degree of cruelty, yet the final test of the sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party. * * *

The practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body 'can be practically endured,' and must be endured if there is no other remedy than by divorce, because no 'scale' by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body."³¹

When the mental suffering is so great that it preys upon the mind and undermines the health, though the suffering is caused by words and conduct, unaccompanied by any act of physical violence, the result is bodily harm, and hence such conduct constitutes legal cruelty. The tendency of modern decisions, as the effect of mental suffering upon bodily health has come to be more fully understood, is towards much greater latitude than is found in the earlier cases, in granting divorces in cases of so-called "mental cruelty." Without repudiating the doctrine that the injury must be physical, the courts recognize that legal cruelty may exist in systematic abuse, humiliating insults and annoyances, causing mental suffering and consequent ill health, as fully as in acts of violence.³² "A hus-

³¹ *Waldron v. Waldron*, 85 Cal. 251, 21 Pac. 649. In a later case in California the court said that this quotation was too narrow under their statute declaring extreme cruelty to be the infliction of grievous bodily injury, "or grievous mental suffering." *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 299; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566.

³² *Butler v. Butler*, 1 Pars. Eq. Cas. (Pa.) 329; *Kelly v. Kelly*, 2 Prob. & Div. 31; *Walmesley v. Walmesley*, 1 Reports, 529, 69 Law T. (N. S.) 152; *Bailey v. Bailey*, 97 Mass. 371; *Kelly v. Kelly*, 18 Nev. 49, 1 Pac. 191; *Fowler v. Fowler*, 58 Hun, 601, 11 N. Y. Supp. 419; *Cole v. Cole*, 23 Iowa, 433; *Day v. Day*, 84 Iowa, 221, 50 N. W. 979; *Williams v. Williams*, 23 Fla. 324, 2 South. 768; *Powelson v. Powelson*, 22 Cal. 358; *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767; *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912; *Rosenfeld v. Rosenfeld* (Colo. Sup.) 40 Pac. 49; *Latham v. Latham*, 30 Grat. (Va.) 307; *Freeman v. Freeman*, 31 Wis. 235, 249; *Glass v. Wynn*, 76 Ga. 319; *Leach v. Leach* (Me.) 8 Atl. 349; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122.

band may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy in such circumstances under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty, when the subject is considered with reference to the principles on which the divorce for cruelty is predicated. The courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects, not solely from the means by which those effects are produced. To hold absolutely that, if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of these which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given the wrongdoer. The more rational application of the doctrine of cruelty is to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife, and, if it has been such as to affect or injure either, to regard it as true legal cruelty.”³³

A divorce on the ground of cruelty will not be granted if the ill treatment has been caused by the misconduct of the plaintiff. Cruelty, as a foundation for a divorce, must be unmerited and unprovoked. “If her conduct be totally incompatible with the duty of a wife, if it be violent and outrageous, if it justly provoke the indignation of the husband, and cause danger to his person, she must reform her own disposition and manner.”³⁴ But although the plain-

³³ *Butler v. Butler*, supra.

³⁴ *Waring v. Waring*, 2 Phillim. 132; *Poor v. Poor*, 8 N. H. 307; *Skinner v. Skinner*, 5 Wis. 449; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Knight v. Knight*, 31 Iowa, 451; *Moulton v. Moulton*, 2 Barb. Ch. (N. Y.) 309; *Richards v. Richards*, 37 Pa. St. 225; *Daiger v. Daiger*, 2 Md. Ch. 335; *Childs v. Childs*, 49 Md. 509; *Johnson v. Johnson*, 14 Cal. 460; *Reed v. Reed*, 4 Nev. 395; *Harper v. Harper*, 29 Mo. 301. Violence committed in a quarrel in which both are at fault, and resulting in equal injury to both, is not ground for divorce. *Soper v. Soper*, 29 Mich. 305; *Castanedo v. Fortier*, 34 La. Ann. 135; *Maben v. Maben*, 72 Iowa, 658, 34 N. W. 462.

tiff may have brought the ill treatment of which she complains upon herself, if it is wholly out of proportion to her offense, intemperate, and inexcusably severe, her misconduct will not bar her right to relief.³⁵

SAME—DESERTION.

102. In most states, by statute, desertion for a prescribed period is made ground for divorce. Desertion is withdrawal from cohabitation by one of the parties, with intent to abandon the other, without the other's consent, and without justification. In detail, to entitle an abandoned husband or wife to a divorce on the ground of desertion—

- (a) There must have been a cessation of cohabitation.
- (b) Cohabitation must have ceased for the entire statutory period.
- (c) There must have been an intent to abandon.
- (d) There must have been no consent on the part of the abandoned spouse.
- (e) There must have been no misconduct on the part of the abandoned spouse justifying the abandonment.

As was stated in treating of the effect of marriage upon the persons of the spouses, they are mutually entitled to cohabitation and intercourse. It is true that in this country no suit will lie for restitution of conjugal rights, and that, in the absence of a statute, there is no legal remedy by which an abandoned spouse can either compel the other to return, or be freed from the marriage tie. An abandoned wife has certain powers which she does not have while cohabiting with her husband, as the power to engage in business and contract as a feme sole, and the power to purchase necessities on her husband's credit, if she can obtain them; but most of her disabilities remain

³⁵ *Evans v. Evans*, 1 Hagg. Const. 35; *Waring v. Waring*, 2 Phillim. 132; *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1, p. 72; *Hawkins v. Hawkins*, 65 Md. 104, 3 Atl. 749; *King v. King*, 28 Ala. 315; *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Boeck v. Boeck*, 16 Neb. 196, 20 N. W. 223; *Marsh v. Marsh*, 64 Iowa, 667, 21 N. W. 130; *Machado v. Bonet*, 39 La. Ann. 475, 2 South. 49.

notwithstanding the abandonment, and the rights of her husband in her property continue.

This is the state of things at common law, but it has been changed to some extent in most states by statutes making desertion a ground for divorce. Desertion consists in the willful and unjustifiable abandonment of one of the spouses by the other, without the other's consent.³⁶ The length of time during which the desertion must last varies under the statutes of the different states. In some it must last for three years, while in others it need last for one year only. To constitute such a desertion as will entitle the aggrieved spouse to a divorce, there must be (1) a cessation of cohabitation (2) for the time prescribed by the statute; (3) an intention to abandon; (4) want of consent on the part of the party abandoned; and (5) the abandonment must be unjustifiable. These are the elements of a "desertion," as the term is used in the divorce laws.

Abandonment and Cessation of Cohabitation.

To cohabit is to live together as husband and wife.³⁷ Although a husband may continue to support his wife, there is a cessation of cohabitation if they cease to dwell together. "There is no more important right of the wife than that which secures to her, in the marriage relation, the companionship of her husband and the protection of his home. His willful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is desertion, within the meaning of our statute; and such conduct is not relieved by the fact that he has from time to time contributed to her support and the support of her children."³⁸ Whether refusal of marital intercourse is desertion is a question upon

³⁶ Bailey v. Bailey, 21 Grat. 43; Burk v. Burk, 21 W. Va. 445; Rose v. Rose, 50 Mich. 92, 14 N. W. 711; Bennett v. Bennett, 43 Conn. 313; Hardenbergh v. Hardenbergh, 14 Cal. 634; Sergeant v. Sergeant, 33 N. J. Eq. 204.

³⁷ Yardley's Estate, 75 Pa. St. 207; Pollock v. Pollock, 71 N. Y. 137; ante, p. 48.

³⁸ Magrath v. Magrath, 103 Mass. 577; Yeatman v. Yeatman, 1 Prob. & Div. 480. Likewise, when a husband has been deserted by his wife, he may obtain a divorce on that ground, though he has continued to provide for her. Macdonald v. Macdonald, 4 Swab. & T. 242; Stoffer v. Stoffer, 50 Mich. 491, 15 N. W. 564; Bauder's Appeal, 115 Pa. St. 480, 10 Atl. 41; Parker v. Parker, 28 Ill. App. 22.

which the authorities are conflicting. Desertion was not a ground of divorce in the ecclesiastical courts. There the remedy was by suit for restitution of conjugal rights. Since the jurisdiction of the ecclesiastical courts in that action extended only to enforcing cohabitation, and not to compelling marital intercourse,³⁹ it has been held, in analogy to the suit for restitution of conjugal rights, or independently of such consideration, that such refusal does not constitute desertion.⁴⁰ Some of the courts have taken the contrary view, and hold that refusal of sexual intercourse for the period necessary to constitute desertion under the statute is desertion, within the meaning of the statute.⁴¹

There may be desertion without a going away. When either spouse, after having deserted the other, offers in good faith to return, but is refused, such refusal, unless justified, will constitute desertion.⁴² And a refusal to renew cohabitation after a separation by consent is, if the other elements are present, a desertion on the part of the one so refusing.⁴³ As has been seen in another place, the husband has a right to fix the family domicile, subject to some restrictions. If, therefore, the wife, without justifiable cause, refuses to follow him, she is guilty of desertion.⁴⁴

By the weight of authority, if a husband drives his wife away from

³⁹ *Forster v. Forster*, 1 Hagg. Const. 154.

⁴⁰ *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492; *Watson v. Watson* (N. J. Ch.) 28 Atl. 467; *Southwick v. Southwick*, 97 Mass. 327; *Cowles v. Cowles*, 112 Mass. 298; *Steele v. Steele*, 1 MacArthur (D. C.) 505; *Reid v. Reid*, 21 N. J. Eq. 331; *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473; *Morrison v. Morrison*, 20 Cal. 432; *Eshbach v. Eshbach*, 23 Pa. St. 343. See *Kennedy v. Kennedy*, 87 Ill. 254.

⁴¹ *Fritts v. Fritts*, 36 Ill. App. 31; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. See *Heermance v. James*, 47 Barb. (N. Y.) 120; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; 1 Bish. Mar., Div. & Sep. § 1676 et seq.

⁴² *Grove's Appeal*, 37 Pa. St. 443; *Clement v. Mattison*, 3 Rich. Law (S. C.) 93; *English v. English*, 6 Grant (U. C.) 580; *M'Gahay v. Williams*, 12 Johns. (N. Y.) 293; *Fellows v. Fellows*, 31 Me. 342; *Walker v. Loughton*, 31 N. H. 111; *Hannig v. Hannig* (Tex. Civ. App.) 24 S. W. 695. See cases cited in note 51, *infra*.

⁴³ *Butler v. Butler*, 1 Pars. Eq. Cas. (Pa.) 329; *Hankinson v. Hankinson*, 33 N. J. Eq. 66; *McAllister v. McAllister*, 10 Heisk. (Tenn.) 345; *Gilbert v. Gilbert*, 5 Misc. Rep. 555, 26 N. Y. Supp. 30.

⁴⁴ *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820.

him, or by his misconduct gives her justifiable cause for leaving him, his conduct amounts to desertion as fully as if he left her, and will support a suit by the wife for a divorce on that ground.⁴⁵ The Massachusetts court has held the contrary;⁴⁶ but reason, as well as authority, is against it. As was said by Putnam, J., dissenting, in a Massachusetts case: "Now, to all legal and reasonable intendment, the wife who is obliged to fly from her husband's violence and house into the street, for her preservation, is to be considered to be there, not of her own free will, but by reason of the force and violence of her husband. He has driven her from him; and I hold that it would be a perversion of terms to say that she, under those circumstances, deserted him. * * * Having done the outrage, the husband leaves her to go into the world without house, home, or shelter, food or raiment, support, protection, or aid from him. * * * I call this desertion."⁴⁷

Period of Abandonment.

To entitle an abandoned husband or wife to a divorce, the cessation of cohabitation must continue during the whole period prescribed by the statute. If cohabitation is resumed even for the briefest period, and again ceases, the period of desertion must be calculated from the time of the last abandonment.⁴⁸ Where a wife who had abandoned her husband returned occasionally to look after her children, and perform domestic duties, it was held that this was not a renewal of cohabitation;⁴⁹ but where a wife returned and per-

⁴⁵ Warner v. Warner, 54 Mich. 492, 20 N. W. 557; James v. James, 58 N. H. 268; Grove's Appeal, 37 Pa. St. 443; Morris v. Morris, 20 Ala. 168; Kinsey v. Kinsey, 37 Ala. 393; Jones v. Jones, 95 Ala. 443, 11 South. 11; Skean v. Skean, 33 N. J. Eq. 148; Palmer v. Palmer, 22 N. J. Eq. 88, 91; Levering v. Levering, 16 Md. 213; Harding v. Harding, 22 Md. 337; Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891; Wood v. Wood, 5 Ired. (N. C.) 674; Weigand v. Weigand, 42 N. J. Eq. 699, 11 Atl. 113; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Stiles v. Stiles, 52 N. J. Eq. 446, 29 Atl. 162.

⁴⁶ Pidge v. Pidge, 3 Metc. (Mass.) 257.

⁴⁷ Per Putnam, J., in Pidge v. Pidge, *supra*.

⁴⁸ Ex parte Aldridge, 1 Swab. & T. 88; Burk v. Burk, 21 W. Va. 445; Crossman v. Crossman, 33 Ala. 486; Gaillard v. Gaillard, 23 Miss. 152; Kennedy v. Kennedy, 87 Ill. 250.

⁴⁹ Rie v. Rie, 34 Ark. 37.

formed ordinary domestic duties for several years, living in the same house with her husband, he was denied a divorce for desertion.⁵⁰

Return or Offer to Return.

In case of desertion there is always a locus pœnitentiæ until the right to a divorce is complete. The deserting spouse may, until then, return, or offer to return, and the other must permit it. An offer to renew cohabitation made by the deserting spouse in good faith at any time before the separation has lasted for the period required by the statute will bar a divorce, though refused by the deserted party.⁵¹ Indeed, as has been seen, such a refusal constitutes desertion.⁵² Such an offer, however, after the desertion has lasted for the statutory period, will be too late.⁵³

Intention to Abandon.

The mere cessation of cohabitation for the time prescribed in the statute is not desertion, unless there is also an intention to abandon. The cessation of cohabitation and intent to abandon must concur. Separation, for instance, caused by necessary absence on business, or by sickness, or other necessity, is not desertion, within the meaning of the divorce law. In a Connecticut case, it appeared that the wife had lived separate from her husband at his request, because of his inability to furnish a satisfactory support for her or their children. "This," said the court, "does not of itself constitute desertion on his part. For the purposes of this case, it is sufficient to say that the offense of desertion consists in the cessation of cohabitation, coupled with a determination in the mind of the offending party not to renew it. This intent is the decisive characteristic, and the question of intent is always a question of fact, and must be proved either by direct evidence, or as the necessary and certain consequence of other facts clearly proved. Mere separation may

⁵⁰ Holmes v. Holmes, 44 Mich. 555, 7 N. W. 228.

⁵¹ Brookes v. Brookes, 1 Swab. & T. 326; Gaillard v. Gaillard, 23 Miss. 152; McClurg's Appeal, 66 Pa. St. 366; Prather v. Prather, 26 Kan. 273; Walker v. Loughton, 11 Post. (N. H.) 111; Friend v. Friend, Wright (Ohio) 639; Fishli v. Fishli, 2 Litt. (Ky.) 337. And see cases cited in note 42, supra.

⁵² Ante, p. 183.

⁵³ Cargill v. Cargill, 1 Swab. & T. 235. See Graeff v. Graeff (N. J. Ch.) 27 Atl. 704.

result from necessity or accident, and be much against the will of both parties.”⁵⁴

It is immaterial that the intention to abandon did not exist at the time of the separation, if it was afterwards formed and acted upon. The intention not to return, formed after separation has taken place, accompanied by continuation of the separation, is desertion; but the desertion in such a case begins when the intention is formed.⁵⁵

That there was an intent to abandon need not be shown by direct evidence, but, like intent in other cases in which it is material in law, may be inferred from the circumstances. It may be presumed from long abandonment without apparent cause.⁵⁶ Such an intent, when once shown to have existed, will be presumed to have continued, until the contrary appears.⁵⁷

Consent of the Abandoned Spouse.

Not only must there be a cessation of cohabitation for the statutory period, and an intent to abandon, to constitute desertion, but the abandonment must be without the consent of the party abandoned. Nothing is better settled than that abandonment or separation by actual consent—whether such consent is expressed in the form of an agreement, or is inferred from the conduct of the parties and the circumstances—cannot be relied upon as ground for divorce. “Desertion can only be complained of when it is against the will of the party who is deserted (in this case the husband), and constitutes a grievance which deprives him of the society of his wife without his consent or acquiescence. If there be a sepa-

⁵⁴ *Bennett v. Bennett*, 43 Conn. 313. And see *Bailey v. Bailey*, 21 Grat. (Va.) 43; *Burk v. Burk*, 21 W. Va. 445; *Cook v. Cook*, 13 N. J. Eq. 263; *Jennings v. Jennings*, Id. 38; *McCoy v. McCoy*, 3 Ind. 555; *Williams v. Williams*, 3 Swab. & T. 547; *Ex parte Aldridge*, 1 Swab. & T. 88; *Bruner v. Bruner*, 70 Md. 105, 16 Atl. 385; *Keech v. Keech*, 1 Prob. & Div. 641; *Williams v. Williams* (Ky.) 21 S. W. 529. The confinement of a wife in an insane asylum is not an abandonment of her husband. *Pile v. Pile*, 94 Ky. 308, 22 S. W. 215.

⁵⁵ *Pinkard v. Pinkard*, 14 Tex. 356; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. (N. Y.) 47; *Fulton v. Fulton*, 36 Miss. 517; *Reed v. Reed*, *Wright* (Ohio) 224; *Gatehouse v. Gatehouse*, 1 Prob. & Div. 331. See *Conger v. Conger*, 13 N. J. Eq. 286.

⁵⁶ *Morrison v. Morrison*, 20 Cal. 431.

⁵⁷ *Bailey v. Bailey*, 21 Grat. (Va.) 43; *Gray v. Gray*, 15 Ala. 779.

ration by consent, that consent shows that the parties deem it no grievance to be deprived of each other's society, and nothing but an unconditional and entire resumption of their early relations can restore them to such a position as would make a new separation by the departure of the wife, as in this case, a criminal desertion."⁵⁸

The consent of the abandoned party, like consent in other cases where consent is material, need not be proved by direct evidence, but may be inferred from his or her conduct, or from the conduct of both parties. The consent must in some way be manifested. "The undisclosed emotions of the deserted party do not affect his rights."⁵⁹ But the fact of consent may be shown by his conduct.⁶⁰

Consent to the separation may be inferred from a course of conduct inducing it,⁶¹ or from a course of conduct promoting the continuance of a separation which has already taken place.⁶² If, after a wife has separated from her husband, even without justification, she offers to return to him, and he refuses to receive her, her continuing away is not desertion. And such refusal may be inferred from his conduct towards her after the offer to return. Thus, where a wife who was living apart from her husband, each denying desertion, and alleging that the fault was on the part of the other, offered to live with him if he would treat her as a wife, and he saw her but once after the offer, and never asked her to come back, or made any effort to have her return and live with

⁵⁸ *Cooper v. Cooper*, 17 Mich. 205. And see *Cox v. Cox*, 35 Mich. 461; *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Beller v. Beller*, 50 Mich. 51, 14 N. W. 696; *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; *Lea v. Lea*, 8 Allen (Mass.) 418; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Benkert v. Benkert*, 32 Cal. 467; *Secor v. Secor*, 1 MacArthur, 630; *Crow v. Crow*, 23 Ala. 583; *Stokes v. Stokes*, 1 Mo. 320; *Ingersoll v. Ingersoll*, 49 Pa. St. 249; *Fulton v. Fulton*, 36 Miss. 517; *Adams v. Adams*, 66 Hun, 627, 20 N. Y. Supp. 765; *Townsend v. Townsend*, L. R. 3 Prob. & Div. 129; *Fitzgerald v. Fitzgerald*, Id. 136; *Buckmaster v. Buckmaster*, L. R. 1 Prob. & Div. 713; *Ward v. Ward*, 1 Swab. & T. 185.

⁵⁹ *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474.

⁶⁰ *Ford v. Ford*, *supra*.

⁶¹ *Meldowney v. Meldowney*, 27 N. J. Eq. 328; *Gray v. Gray*, 15 Ala. 779; *Gillinwaters v. Gillinwaters*, 28 Mo. 60; *Dwyer v. Dwyer*, 16 Mo. App. 422.

⁶² *Taylor v. Taylor*, 28 N. J. Eq. 207; *Cornish v. Cornish*, 23 N. J. Eq. 208; *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482; *Payne v. Payne* (N. J. Ch.) 28 Atl. 449; *Dwyer v. Dwyer*, 16 Mo. App. 422; *Schoen v. Schoen*, 48 Ill. App. 382.

him, it was held that she was not guilty of desertion after the offer.⁶³

Even where a wife who has deserted her husband without cause makes no offer to return to him, his conduct may show that he would not receive her back. If he does so act as to show affirmatively that he will not receive her back, he consents to the separation, and cannot rely upon its continuance as a ground for divorce. He is not bound to take any active steps to get her back, and therefore his mere silence will not amount to consent; but it is a very different thing if he shows by an overt act that he is not willing to receive her. On this principle, it has been held that if a wife has deserted her husband, and, pending the separation, he brings suit against her for a divorce on the ground of adultery, this shows that he is not willing to receive her back, and that he cannot rely on the continuance of the separation pending the suit as desertion, entitling him to a divorce on that ground.⁶⁴ The Minnesota court has made a distinction on this point between cases in which the deserting spouse is guilty of the adultery and cases in which he or she is innocent, and has held that where, after a wife has deserted her husband, he brings a suit for divorce on the ground of her adultery after the desertion, the divorce suit may prevent her continuing to remain away from him from being desertion if she is innocent, but that it cannot have this effect if she is guilty. "If a defendant," it was said, "resisting an action founded upon her alleged desertion, relies upon such an intervening event as suspending or interrupting the effect of the desertion, and if it appear that her own wrongful conduct naturally caused the event relied upon in defense, such a defense cannot avail her. An unjustifiable desertion continues to be desertion, in legal contemplation and effect, none the less although it be attended by such wrongful conduct on

⁶³ *Bradley v. Bradley*, *supra*.

⁶⁴ *Ford v. Ford*, *supra*. That separation during the pendency of divorce proceedings is not desertion, see, also, *Clowes v. Clowes*, 9 Jur. 356; *Marsh v. Marsh*, 14 N. J. Eq. 315; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483; *Porritt v. Porritt*, 18 Mich. 420; *Doyle v. Doyle*, 26 Mo. 545; *Salorgne v. Salorgne*, 6 Mo. App. 603; *Edwards v. Green*, 9 La. Ann. 317; *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588; *Graeff v. Graeff* (N. J. Ch.) 25 Atl. 704.

the part of the deserting party as would naturally forbid his being received again, while unreformed, to matrimonial cohabitation.”⁶⁵

Misconduct of the Abandoned Spouse.

The abandonment, to constitute desertion, even where there is no actual consent, must be unjustifiable. If either spouse is guilty of such misconduct as to justify the other in leaving, the latter's absence does not amount to desertion.⁶⁶ “It has accordingly been declared,” says the Massachusetts court, “by the great weight of American authority, that ill treatment or misconduct of the husband of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce against him might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so.”⁶⁷

SAME—MISCELLANEOUS OTHER GROUNDS.

103. Various other grounds for divorce are prescribed by the statutes of some of the states. Among them may be mentioned:

- (a) Habitual drunkenness, in most states.
- (b) Conviction of crime and imprisonment under certain circumstances, in most states.
- (c) Incurable insanity, in some states.
- (d) Separation not amounting to desertion, in a few states.
- (e) Nonsupport, under certain circumstances, in some states.
- (f) Where the other party has obtained a divorce in another state, in some states.

⁶⁵ Wagner v. Wagner, 39 Minn. 394, 40 N. W. 360.

⁶⁶ Lyster v. Lyster, 111 Mass. 327; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Hardin v. Hardin, 17 Ala. 250; Gillinwaters v. Gillinwaters, 28 Mo. 60; Neff v. Neff, 20 Mo. App. 182; Weigand v. Weigand, 42 N. J. Eq. 699, 11 Atl. 113. See the cases cited in note 45, supra. But see 1 Bish. Mar., Div. & Sep. § 1748 et seq., where it is contended that this is true only to the extent that such conduct is evidence of consent, and bars a divorce for desertion on that ground.

⁶⁷ Lyster v. Lyster, supra.

- (g) Causes rendering marriage void or voidable, in some states; like impotence, relationship, prior marriage, mental incapacity, non-age, fraud, and duress.
- (h) In addition to these, there are other grounds in some states.⁶⁸

Adultery, cruelty, and desertion are the most common grounds for a divorce; and they are the only grounds of which the size and scope of this work will permit of treatment at any length. It may be well, however, to call attention to the fact that the statutes in the various states have made numerous other acts or circumstances grounds for divorce, and to mention the substance of these statutes shortly, leaving the student to consult the local statutes to determine the grounds for divorce in his own state.

Habitual Drunkenness, etc.

In nearly all of the states a divorce a vinculo matrimonii, or a mensa et thoro, or either, at the option of the injured spouse, may be granted for "habitual drunkenness," "gross and confirmed habits of intoxication," such intoxication as renders "living together insupportable," etc. The language of the statutes differ, but they mean substantially the same thing.⁶⁹ Perhaps under none of the statutes will a divorce be granted unless it is shown that the habits of drunkenness are confirmed and continued.⁷⁰ A man who drinks to excess may be an habitual drunkard, although he is not constantly drunk, but there are intervals when he refrains entirely from the use of intoxicating liquors. The excessive indulgence in intoxicating drinks as a fixed habit is habitual drunkenness. A person who frequently drinks to excess, and becomes intoxicated whenever the temptation is presented and the opportunity is afforded him, is an habitual drunkard, within the meaning of the statutes.⁷¹

⁶⁸ Post, p. 189.

⁶⁹ Stim. Am. St. Law, § 6206. "Continued drunkenness" and "habitual drunkenness" mean the same thing. *Gourlay v. Gourlay*, 16 R. I. 705, 19 Atl. 142.

⁷⁰ *Gourlay v. Gourlay*, *supra*.

⁷¹ *Walton v. Walton*, 34 Kan. 195, 8 Pac. 110; *McBee v. McBee*, 22 Or. 329, 29 Pac. 887; *Ludwick v. Com.*, 18 Pa. St. 172; *State v. Pratt*, 34 Vt. 323; *Magahay v. Magahay*, 35 Mich. 210; *Blaney v. Blaney*, 126 Mass. 205; *Mack*

The word "drunkenness," or the word "intoxication," is used in the statute in its ordinary sense, as referring to the effect of intoxicating liquors, and does not include the use of morphine or other drugs, though the effect of their use is similar.⁷² A wife cannot set up habitual drunkenness if, at the time of the marriage, she knew that the habit existed.⁷³

Conviction of Crime and Imprisonment.

In most states conviction of either party of a crime, and sentence to imprisonment in the state prison, is declared a ground of divorce. In some states no time of sentence is prescribed, while in others the imprisonment must be for a certain number of years, varying in the different states, and in some it must be for life. In some states a divorce may be granted if either party has been indicted for an infamous offense, and is a fugitive from justice; in some he must have been a fugitive for a prescribed time. In some states conviction of a felony or infamous crime⁷⁴ is made a ground for divorce, without

v. Handy, 39 La. Ann. 491, 2 South. 181; De Lesdernier v. De Lesdernier, 45 La. Ann. 1364, 14 South. 191; Williams v. Goss, 43 La. Ann. 868, 9 South. 750; Golding v. Golding, 6 Mo. App. 602; Brown v. Brown, 38 Ark. 324; Richards v. Richards, 19 Ill. App. 465; McGill v. McGill, 19 Fla. 341; Mahone v. Mahone, 19 Cal. 627. "The phrase 'habitual intemperance' scarcely requires an interpretation. It is easily understood. It means the custom, or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous or even of daily occurrence." Mack v. Handy, *supra*. Though the periods of a husband's intoxication occurred only three or four times a year, yet, where they lasted a week or ten days at a time, and he then became grossly intoxicated, and went or was sent to an inebriate asylum, and such periods had occurred for twelve or fifteen years, he was held to be an habitual drunkard. Blaney v. Blaney, *supra*.

⁷² Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, affirming 33 Ill. App. 223. And see Com. v. Whitney, 11 Cush. (Mass.) 477, where it was held that evidence of habitual intoxication from the use of chloroform would not sustain a criminal charge, under a statute, of being a common drunkard.

⁷³ Porritt v. Porritt, 16 Mich. 140; Tilton v. Tilton (Ky.) 29 S. W. 290; Blaney v. Blaney, 126 Mass. 205.

⁷⁴ In Wheeler v. Wheeler, 2 Pa. Dist. R. 567, it was held that assault with intent to rape was not an "infamous" crime, within the meaning of the statute. In most states, however, this would not be so; but all offenses are

mentioning imprisonment or sentence. As a rule, no pardon can restore the guilty party to his marital rights.

In some states the statutes extend to conviction and imprisonment in another state.⁷⁵ It has been held that, unless the statute expressly so provides, it cannot be so extended.⁷⁶ This, however, does not seem reasonable. The reasons why a divorce should be granted are as strong where the imprisonment and conviction are without the state as where they are within it.

A woman cannot knowingly marry a felon after his conviction, and afterwards set up such conviction, or a sentence to imprisonment based thereon, as ground for divorce. It has therefore been held that since a woman who marries a man who has been convicted of a crime, while his case is pending on exceptions in the supreme court, must know that sentence is likely to follow such conviction, a subsequent sentence can be no ground for divorce.⁷⁷

In Wisconsin a statute provides that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process; and there are similar statutes in other states. This, however, is a case of legislative divorce.⁷⁸

Insanity.

If the absence of a statute expressly allowing it, a divorce cannot be granted on the ground of the other party's insanity.⁷⁹ In some states, however, statutes have been enacted entitling a party to a divorce where the other party is incurably insane.⁸⁰

felonies and infamous that are or may be punishable by death or imprisonment in the state prison. See Clark, Cr. Law, 34; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111.

⁷⁵ Frantz v. Frantz, 11 Pa. Co. Ct. R. 467.

⁷⁶ Leonard v. Leonard, 151 Mass. 151, 23 N. E. 732; Martin v. Martin, 47 N. H. 53.

⁷⁷ Caswell v. Caswell, 64 Vt. 557, 24 Atl. 988.

⁷⁸ Post, p. 208.

⁷⁹ Pile v. Pile, 94 Ky. 308, 22 S. W. 215.

⁸⁰ As to sufficiency of insanity, see Hanbury v. Hanbury [1892] Prob. 222. That such a law is valid, see Hickman v. Hickman, 1 Wash. St. 257, 24 Pac. 445.

Grounds Similar to Desertion—Nonsupport.

In a few states either party may obtain a divorce where they have voluntarily lived entirely separate for a certain length of time; and in some states a divorce may be granted when either party has separated from the other without his or her consent, and joined with a religious sect or society that professes to believe the marriage relation void or unlawful, and refused to cohabit with the other. In a few states a party is entitled to a divorce when the other party has obtained a divorce in another state;⁸¹ and in some a divorce may be granted for disappearance of either party, and absence for a certain length of time without being heard of. In a number of states, failure of the husband to support his wife, where he is able to do so, is made a ground for divorce.⁸²

Divorce as a Substitute for Decree of Nullity.

Nullity suits—that is, suits to have a marriage judicially annulled for causes existing at the time it was entered into, and rendering it void or voidable—have been explained in treating of marriage, and properly so, for they are entirely different from a suit for divorce. In case of a decree of nullity the effect is not to dissolve an existing marriage, but to declare that a valid marriage has never existed. A suit for a divorce, on the other hand, is to dissolve a marriage that is valid. In many of the states a suit for divorce has been substituted by statute for the remedy by suit for nullity, or else has been made a concurrent remedy. In a number of states, by statute, a divorce

⁸¹ *Van Inwagen v. Van Inwagen*, 86 Mich. 333, 49 N. W. 154.

⁸² *Lillie v. Lillie*, 65 Vt. 109, 26 Atl. 525; *Caswell v. Caswell*, 66 Vt. 242, 28 Atl. 988; *Runkle v. Runkle*, 96 Mich. 493, 56 N. W. 2. Under a statute providing that the wife may have a divorce when the husband, being of "pecuniary ability," without cause refuses to support her, and construing "pecuniary ability" to mean ability to provide for a wife, either from labor, income of property, or otherwise, it was held that a wife could not obtain a divorce because her husband, being able-bodied, would not work, and had therefore no means, and could not support her. *Jewett v. Jewett*, 61 Vt. 370, 17 Atl. 734. And see *Farnsworth v. Farnsworth*, 58 Vt. 555, 5 Atl. 401. A divorce was refused where the failure of the husband to support his wife was due to his committal to prison under sentence; the statute allowing a divorce for "neglect or refusal on the part of the husband, being of sufficient ability, to provide necessaries for the subsistence of his wife." *Hammond v. Hammond*, 15 R. I. 40, 23 Atl. 143.

may be obtained for impotence or physical incapacity of either party existing at the time of the marriage;⁸³ or because the marriage is within the prohibited degrees of relationship; or because either party was already married to another,⁸⁴ or was non compos mentis, or under the age of consent; or because the marriage was procured by fraud or duress.⁸⁵

Other Grounds.

Other grounds for divorce prescribed by statute in some of the states are "gross misbehavior and wickedness of either party repugnant to and in violation of the marriage contract"; "any infamous crime involving a violation of conjugal duty"; "any gross neglect of duty";⁸⁶ commission of buggery either before or after the marriage; when, unknown to the husband, the wife had been guilty of fornication before the marriage, or was pregnant by another man, or was a prostitute, or was matrimonially incapacitated.⁸⁷ So, on the other hand, the wife is entitled to a divorce in

⁸³ As to what constitutes impotence, see *Payne v. Payne*, 46 Minn. 467, 49 N. W. 230. "Physically incapacitated," as used in the statute, has been held to mean "impotent." *Anon.*, 89 Ala. 291, 7 South. 100. It has, however, been considered a broader term than "impotent." Thus, a woman who was afflicted with chronic syphilis was held physically incapacitated. *Ryder v. Ryder*, 60 Vt. 158, 28 Atl. 1029. Impotence, to authorize a divorce, must be incurable, or, being curable, the party must refuse to submit to treatment. *Griffith v. Griffith*, 55 Ill. App. 474. As to the effect of impotence on the validity of a marriage, and suits for nullity, see ante, pp. 24, 35.

⁸⁴ See *Ralston v. Ralston*, 2 Pa. Dist. R. 241.

⁸⁵ Where one claims to have been fraudulently induced to marry by the representations of the woman that she was pregnant by illicit intercourse indulged in by them, but failed to show that he was deceived thereby, is not entitled to a divorce under a statute allowing a divorce "where the alleged marriage was procured by fraud, force, or coercion, and has not been subsequently confirmed by the acts of the parties." *Todd v. Todd*, 149 Pa. St. 60, 24 Atl. 128.

⁸⁶ Where the wife has refused for more than five years to cohabit with her husband as his wife, or to perform any of her household duties, her conduct is "gross neglect of duty," within the meaning of the statute. *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131.

⁸⁷ Pregnancy at the time of the marriage, unknown to the husband, who had had no intercourse with her, is "matrimonial incapacity." *Caton v. Caton*, 6 Mackey (D. C.) 309.

some states where the husband, unknown to the wife, was a notoriously licentious person at the time of the marriage.

In several states there is a general clause in the statute which allows the courts a very wide discretion in granting divorces. In Washington the statute allows a divorce "for any other cause deemed by the court sufficient, if satisfied that they [the parties] can no longer live together." In Connecticut a divorce could formerly be granted "for any such misconduct as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relation"; but this clause has been repealed. In Wisconsin a divorce may be allowed "when, by reason of his conduct towards her being such as to render it improper for her to live with him, the court are of opinion that it will be discreet and proper to grant the divorce." In Arizona a divorce could formerly be granted "when the case is within the reason of the law, within the general mischief the law is intended to remedy, or within what it may be presumed the legislature establishing the foregoing causes would have provided against had they foreseen the specific case"; but this provision seems to be no longer in operation. In Florida a divorce is allowed "for the habitual indulgence of a violent and ungovernable temper."

DEFENSES—CONNIVANCE.

104. Connivance is the corrupt consenting by one spouse to an offense by the other, and will bar a suit for divorce for such offense.

It is the well-settled rule, and one which the courts are frequently called upon to apply, that, if either spouse consents to conduct on the part of the other which would ordinarily constitute a ground for divorce, he or she will be held to have connived at such conduct, and, on the principle, *volenti non fit injuria*, will not be heard to complain of it as a ground for divorce.⁸⁸ This is expressly declared by the statute in many states. Where it is not so declared, it is

⁸⁸ *Forster v. Forster*, 1 Hagg. Consist. 146; *Rogers v. Rogers*, 3 Hagg. Ecc. 57; *Anichini v. Anichini*, 2 Curt. Ecc. 210; *Morrison v. Morrison*, 136 Mass. 310; *Id.*, 142 Mass. 361, 8 N. E. 59; *Myers v. Myers*, 41 Barb. (N. Y.) 114; *Bourgeois v. Chauvin*, 39 La. Ann. 216, 1 South. 679.

nevertheless recognized as the law, for it was the law of the English ecclesiastical courts, and it is to be assumed that the legislature intended to adopt the general principles by which those courts were governed, in so far as they are applicable and reasonable.⁸⁹

On this principle, a husband's connivance at his wife's adultery has frequently been held a complete bar to a divorce for the particular act of adultery connived at, or for subsequent acts either with the same person or with another.⁹⁰ "If he has relaxed with one man, he cannot complain of another."⁹¹ Since "the iniquity which deprives a suitor of a right of justice in a court of equity is not general iniquitous conduct, unconnected with the matter in suit, but evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought," it has been held that connivance by a husband at his wife's adultery is no bar to a suit for a divorce on the ground of prior acts of adultery committed by her without his connivance.⁹² But it was said by the Massachusetts court that "the character of the connivance, under some circumstances, may be so open, gross, and revolting that the court may find that no injury has been done the husband, and that, therefore, there is nothing to redress; that the husband has entirely abandoned all right to claim that his wife should be chaste; and that he has thus consented to her prior adultery. He may come before the court with such impure hands that, upon the soundest considerations of public policy, his divorce should be refused."⁹³

To constitute connivance, it is not necessary that there be any active procurement of the wrongful act. Passive and permissive conduct is sufficient. "I have no difficulty," said Lord Stowell, "in saying that passive conduct is as much a bar as active conspiracy."⁹⁴

⁸⁹ *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59.

⁹⁰ *Gipps v. Gipps*, 3 Swab. & T. 116; *Lovering v. Lovering*, 3 Hagg. Ecc. 85; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424.

⁹¹ *Lovering v. Lovering*, *supra*.

⁹² *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59.

⁹³ *Morrison v. Morrison*, *supra*.

⁹⁴ *Moorsom v. Moorsom*, 3 Hagg. Ecc. 87, 107. And see *Rogers v. Rogers*, Id. 57; *Rix v. Rix*, Id. 74; *Boulting v. Boulting*, 3 Swab. & T. 329; *Cairns*

Where the conduct of the husband "indicates an intention to have his wife transgress, or at least an intention to allow her to do so, undisturbed and unprevented," this amounts to connivance.⁹⁵

There must be, however, consent amounting to a corrupt intention to constitute connivance. "Passive acquiescence would be sufficient to bar the husband, providing it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but, on the other hand, it has always been held that there must be a consent. The injury must be volenti; it must be something more than mere negligence, than mere inattention, than overconfidence, than dullness of apprehension, than mere indifference. It must be intentional concurrence in order to amount to a bar."⁹⁶ If a husband who has reason to suspect his wife of adultery merely does nothing to prevent a recurrence of the act, and takes steps to obtain proof, there is no connivance.⁹⁷ But the law does not allow temptation to be placed in a wife's way in order that advantage may be taken of the consequences. "A husband is not barred by mere permission of opportunity for adultery, nor is it every degree of inattention which will deprive him of relief, but it is one thing to permit and another to invite."⁹⁸ A husband who endeavors to procure his wife to be lured into an act of adultery consents to it.⁹⁹

v. Cairns, 109 Mass. 408; *Morrison v. Morrison*, 136 Mass. 310; *Bourgeois v. Chauvin*, 39 La. Ann. 216, 1 South. 679.

⁹⁵ *Bourgeois v. Chauvin*, *supra*.

⁹⁶ *Rogers v. Rogers*, 3 Hagg. Ecc. 57; *Rix v. Rix*, Id. 74; *Boulting v. Boulting*, 3 Swab. & T. 329; *Marris v. Marris*, 2 Swab. & T. 530; *Glennie v. Glennie*, 8 Jur. (N. S.) 1158; *Gipps v. Gipps*, 11 H. L. Cas. 1; *Phillips v. Phillips*, 1 Rob. Ecc. 144; *Cochran v. Cochran*, 35 Iowa, 477; *Welch v. Welch*, 50 Mo. App. 395.

⁹⁷ *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Robbins v. Robbins*, 140 Mass. 528, 5 N. E. 837; *Pettee v. Pettee*, 77 Hun, 595, 28 N. Y. Supp. 1067; *Wilson v. Wilson*, 154 Mass. 194, 28 N. E. 167.

⁹⁸ *Timmings v. Timmings*, *supra*; *Harris v. Harris*, 2 Hagg. Ecc. 376.

⁹⁹ *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424.

SAME—COLLUSION.

105. Collusion is any agreement between the parties whereby they seek to obtain a divorce by an imposition on the court, and is ground for refusing relief.

In no case will a divorce be granted if it appears that there is collusion between the parties, even though it may appear that there is a valid cause for the divorce. Any agreement between husband and wife by which they are to endeavor to obtain a divorce by imposing upon the court is collusion, within the meaning of this rule.

It is clearly collusion for the parties to agree that one of them shall institute a suit for divorce for a cause which does not exist, although they may have some other ground.¹⁰⁰ It is also collusion for them to agree to suppress facts which are pertinent and material;¹⁰¹ or to institute a suit for divorce in pursuance of an understanding whereby one of them has committed some offense, such as adultery, for the purpose of affording ground for a divorce.¹⁰² And, in general, it is collusion for the parties to act in concert in the conduct of the suit, even though there may be a valid ground for divorce.¹⁰³ But the husband may make the wife a reasonable allowance while the suit is pending, in order to save the expense of an application for alimony.¹⁰⁴ Collusion implies action in concert. There is no collusion, therefore, where one party takes advantage of a matrimonial offense by the other as a ground for divorce, though the offense was committed by the other in the desire, and with the hope and expectation, that such advantage would be taken of it. In other words, the fact that one

¹⁰⁰ *Butler v. Butler*, 15 Prob. Div. 13, 32, 66; *Jessop v. Jessop*, 2 Swab. & T. 301; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331.

¹⁰¹ *Hunt v. Hunt*, 47 Law J. Prob. Div. & Adm. 22; *Barnes v. Barnes*, L. R. 1 Prob. & Div. 505; *Jessop v. Jessop*, 2 Swab. & T. 301.

¹⁰² *Todd v. Todd*, L. R. 1 Prob. & Div. 121; *Crewe v. Crewe*, 3 Hagg. Ecc. 123.

¹⁰³ *Lloyd v. Lloyd*, 1 Swab. & T. 567. But see *Harris v. Harris*, 4 Swab. & T. 232.

¹⁰⁴ *Barnes v. Barnes*, L. R. 1 Prob. & Div. 505; *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056.

party commits an offense, such as adultery or desertion, for the purpose of affording the other grounds for divorce, does not bar the other's right to a divorce, if the other did not act in concert to afford such ground.¹⁰⁵

SAME—CONDONATION.

106. Condonation is the forgiveness of a marital offense constituting a ground for divorce, and bars the right to a divorce. But condonation is on the condition, implied by law when not express, that the wrongdoer shall not again commit that offense, and also that he shall thereafter treat the other with "conjugal kindness"; and a breach of the condition will revive the original offense as a ground for divorce.

107. Condonation may be by express words, if acted upon; or it may be inferred from conduct alone.

The forgiveness or remission by one of the spouses of a marital offense committed by the other is, in law, such a condonation of the offense as will bar a suit for divorce therefor.¹⁰⁶ This doctrine not only applies to adultery, but it also applies to cruelty, and to every other offense that constitutes a ground for divorce.¹⁰⁷

Forgiveness Conditional.

Condonation is always conditional. When the condition is not expressed, the law implies a condition, not only that the particular offense shall not be repeated,¹⁰⁸ but also that the offender shall treat

¹⁰⁵ Shaw v. Gould, L. R. 3 H. L. 55; Crewe v. Crewe, 3 Hagg. Ecc. 123; Utterton v. Tewsh, Ferg. Const. 23; Kibblewhite v. Rowland, Id. 226.

¹⁰⁶ Durant v. Durant, 1 Hagg. Ecc. 733; Westmeath v. Westmeath, 2 Hagg. Ecc. Supp. 1; Ferrers v. Ferrers, 1 Hagg. Const. 130; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; Sewall v. Sewall, 122 Mass. 156; Cumming v. Cumming, 135 Mass. 386; Johnson v. Johnson, 14 Wend. (N. Y.) 637; Quincy v. Quincy, 10 N. H. 272; Turnbull v. Turnbull, 23 Ark. 615.

¹⁰⁷ Gardner v. Gardner, 2 Gray (Mass.) 434; Clague v. Clague, 46 Minn. 461, 49 N. W. 198; McGurk v. McGurk (N. J. Ch.) 28 Atl. 510; Sullivan v. Sullivan, 34 Ind. 368; Phillips v. Phillips, 27 Wis. 252; Nogeas v. Nogeas, 7 Tex. 538.

¹⁰⁸ Durant v. Durant, 1 Hagg. Ecc. 733; Nogeas v. Nogeas, 7 Tex. 538; Sewall v. Sewall, 122 Mass. 156.

the other with "conjugal kindness."¹⁰⁹ A breach of this condition will revive the original offense as a ground for divorce, and it may be relied upon for this end just as fully as if it had never been condoned.¹¹⁰ A condoned offense, whatever it may be, is therefore revived if the wrongdoer is subsequently guilty of adultery, cruelty, desertion, or any other breach of "conjugal kindness."¹¹¹ Acts of cruelty will revive a condoned offense, even though they may not themselves be sufficient as a ground for divorce; and the same must be true of desertion for less than the period required to make it a ground for divorce.¹¹² It was said in a Massachusetts case: "The law is settled in this commonwealth, in accordance with the doctrine declared by Lord Stowell and Sir John Nicholl in the English ecclesiastical courts, that any condonation by the wife of her husband's cruelty is on the implied, if not express, condition of his treating her in the future with conjugal kindness; that any breach of this condition will revive the right to maintain a libel for the original offense; and that such a breach may be shown by act, word, or conduct which would not of themselves prove a cause of divorce. Harshness and rudeness not

¹⁰⁹ "The plainer reason and good sense of the implied condition is 'that you shall not only abstain from adultery but shall in future treat me—in every respect treat me [to use the words of the law]—with conjugal kindness. On this condition I will overlook the past injuries you have done me.'" *Durant v. Durant*, 1 Hagg. Ecc. 743. And see *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1, 114; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637; *Farnham v. Farnham*, 73 Ill. 497; *Warner v. Warner*, 31 N. J. Eq. 225; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; *Shackleton v. Shackleton*, 48 N. J. Eq. 364, 21 Atl. 935; *Nogees v. Nogees*, 7 Tex. 538; *Robbins v. Robbins*, 100 Mass. 150.

¹¹⁰ Cases cited *supra* and *infra*.

¹¹¹ *Worsley v. Worsley*, cited in 1 Hagg. Ecc. 734, 2 Lee, Ecc. 572; *Durant v. Durant*, 1 Hagg. Ecc. 733; *D'Aguilar v. D'Aguilar*, Id. 773; *Bramwell v. Bramwell*, 3 Hagg. Ecc. 618; *Dent v. Dent*, 4 Swab. & T. 105; *Newsome v. Newsome*, L. R. 2 Prob. & Div. 313; *Warner v. Warner*, 31 N. J. Eq. 225; *Farnham v. Farnham*, 73 Ill. 497; *Odom v. Odom*, 36 Ga. 286; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637; *Timerson v. Timerson*, 2 How. Prac., N. S. (N. Y.) 526.

¹¹² *Durant v. Durant*, 1 Hagg. Ecc. 743; *D'Aguilar v. D'Aguilar*, Id. 773; *Bramwell v. Bramwell*, 3 Hagg. Const. 618; *Farnham v. Farnham*, 73 Ill. 497; *Warner v. Warner*, 31 N. J. Eq. 225; *Threewits v. Threewits*, 4 Desaus. Eq. (S. C.) 560; *Marshall v. Marshall*, 65 Vt. 238, 26 Atl. 900; *Robbins v. Robbins*, 100 Mass. 150.

sufficient to maintain a libel may receive a different interpretation and effect upon the question of condonation after proof that the husband has previously gone to the length of positive acts of cruelty."¹¹³

What Amounts to Condonation.

Condonation may be by express words of forgiveness;¹¹⁴ but an offer to forgive will not amount to condonation, unless it is accepted or acted upon by the other party.¹¹⁵ Condonation may also be implied from the conduct of the parties, without proof of express forgiveness, and even, it seems from some of the cases, though it could be shown that there was no forgiveness in fact. Sexual intercourse, for instance, with knowledge of a prior offense, is such condonation.¹¹⁶ Voluntary cohabitation, also, is generally held to be proof of condonation;¹¹⁷ but condonation will not necessarily be implied from the fact that the husband and wife continued to live together, if there was no sexual intercourse.¹¹⁸ Sexual intercourse will be pre-

¹¹³ *Robbins v. Robbins*, 100 Mass. 150.

¹¹⁴ *Beeby v. Beeby*, 1 Hagg. Ecc. 789; *Quincy v. Quincy*, 10 N. H. 272.

¹¹⁵ *Keats v. Keats*, 1 Swab. & T. 334; *Popkin v. Popkin*, 1 Hagg. Ecc. 765, note; *Ferrers v. Ferrers*, Id. 781, note; *Quarles v. Quarles*, 19 Ala. 363; *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767, 1037.

¹¹⁶ *Snow v. Snow*, 2 Notes of Cas. Supp. 13; *Dillon v. Dillon*, 3 Curt. Ecc. 86; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Pitts v. Pitts*, 52 N. Y. 593; *Quincy v. Quincy*, 10 N. H. 272, 274; *Doe v. Doe*, 52 Hun. 405, 5 N. Y. Supp. 514; *Burns v. Burns*, 60 Ind. 259; *Thomas v. Thomas*, 2 Cold. (Tenn.) 123; *Farmer v. Farmer*, 86 Ala. 322, 5 South. 434; *Sparks v. Sparks*, 94 N. C. 527; *Eggerth v. Eggerth*, 15 Or. 626, 16 Pac. 650; *Auld v. Auld* (Super. N. Y.) 16 N. Y. Supp. 803; *Tilton v. Tilton* (Ky.) 29 S. W. 290; *Shackleton v. Shackleton*, 48 N. J. Eq. 364, 21 Atl. 935. But see *Bohnert v. Bohnert*, 95 Cal. 444, 30 Pac. 590, where it was held that a single act of sexual intercourse after the commencement of a suit for a divorce for adultery was not alone sufficient to constitute condonation. See *Hall v. Hall*, 60 Law J. Prob., Div. & Adm. 73.

¹¹⁷ *Beeby v. Beeby*, 1 Hagg. Ecc. 789; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637; *Anon.*, 6 Mass. 147; *Clague v. Clague*, 46 Minn. 461, 49 N. W. 198; *Nullmeyer v. Nullmeyer*, 49 Ill. App. 573; *Land v. Martin*, 46 La. Ann. 1246, 15 South. 657; *McGurk v. McGurk* (N. J. Ch.) 28 Atl. 510.

¹¹⁸ *Dance v. Dance*, 1 Hagg. Ecc. 794, note; *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1; *Guthrie v. Guthrie*, 26 Mo. App. 566; *Harnett v. Harnett*, 59 Iowa, 401, 13 N. W. 408; *Jacobs v. Tobelman*, 36 La. Ann. 842; *Denison v. Denison*, 4 Wash. St. 705, 30 Pac. 1100.

sumed where the husband and wife are living together, but such presumption may be rebutted.¹¹⁹

Because of the dependent position of the wife, condonation will not be so readily inferred from conduct against her as it would be against the husband.¹²⁰

Same—Knowledge of Offense.

Condonation necessarily implies knowledge of the offense committed. Conduct, as, for instance, continued cohabitation and intercourse, cannot be construed as condonation if there was no knowledge of the offense claimed to have been condoned.¹²¹ Mere suspicion is not knowledge. Cohabitation under circumstances which might excite suspicion merely, but without actual knowledge, is not condonation.¹²² That a wife retains confidence in her husband, or a husband in his wife, notwithstanding rumors of his or her adultery, and circumstances tending to show that they may be true, ought not to be treasured up and relied upon as condonation.¹²³ Forgiveness of one act is not forgiveness of other unknown acts; but, when the terms of the forgiveness are general, it is not necessary that there should be actual knowledge of each distinct offense.¹²⁴

¹¹⁹ Beeby v. Beeby, 1 Hagg. Ecc. 789; Snow v. Snow, 2 Notes of Cas. Supp. 1, 13; Burns v. Burns, 60 Ind. 259.

¹²⁰ D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; Beeby v. Beeby, Id. 789; Kirkwall v. Kirkwall, 2 Hagg. Const. 277; Gardner v. Gardner, 2 Gray (Mass.) 434; Wood v. Wood, 2 Paige (N. Y.) 108; Bowic v. Bowic, 3 Md. Ch. 51; Armstrong v. Armstrong, 32 Miss. 279; Horne v. Horne, 72 N. C. 531; Cochran v. Cochran, 35 Iowa, 477; Shackleton v. Shackleton, 48 N. J. Eq. 364, 21 Atl. 935; Clague v. Clague, 46 Minn. 461, 49 N. W. 198.

¹²¹ Durant v. Durant, 1 Hagg. Ecc. 733; Bramwell v. Bramwell, 3 Hagg. Const. 629; Anon., 6 Mass. 147; Rogers v. Rogers, 122 Mass. 423; Delliber v. Delliber, 9 Conn. 233; Odom v. Odom, 36 Ga. 286.

¹²² Quincy v. Quincy, 10 N. H. 272; Polson v. Polson, 140 Ind. 310, 39 N. E. 498; Shackleton v. Shackleton, 48 N. J. Eq. 364, 21 Atl. 935; Welch v. Welch, 50 Mo. App. 395.

¹²³ Polson v. Polson, *supra*.

¹²⁴ Rogers v. Rogers, 122 Mass. 423; Shackleton v. Shackleton, 48 N. J. Eq. 364, 21 Atl. 935.

SAME—RECRIMINATION.

108. Recrimination is a counter charge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce. Adultery is universally, and any conduct which is ground for divorce is in most states, a complete bar to a divorce when set up in recrimination.

In most states it is a good defense in a suit for divorce that the complainant has been guilty of any conduct which constitutes a ground for divorce. This is the doctrine of recrimination. In some states, as will presently be seen, the doctrine is more or less restricted by statute or by judicial decision; and the extent to which acts of one spouse constituting a ground for divorce may be set up in bar of a suit for divorce brought by the other is not the same in all states.

The doctrine of recrimination has its foundation in the principle that one who asks relief must come into court with clean hands. In *Hoff v. Hoff* ¹²⁵ the complainant asked a divorce on the ground of extreme cruelty. The defendant, with an answer denying cruelty, filed a cross bill charging the complainant with extreme cruelty. The court found both cases made out, and awarded a divorce on each bill. On appeal it was held that, when the court found that "each party had been guilty of such conduct as under the statute was cause for divorce, he should have dismissed both bills, and left the parties where their misbehavior had placed them." "A proper administration of justice," it was said, "does not require that courts shall occupy their time and the time of people who are so unfortunate as to be witnesses of the misdoings of others in giving equitable relief to parties who have no equities. And it is as true of divorce cases as of any others that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent, not to the guilty." ¹²⁶

In most of our states the statutes have merely prescribed the

¹²⁵ 48 Mich. 281, 12 N. W. 160.

¹²⁶ And see *Beeby v. Beeby*, 1 Hagg. Ecc. 789; *Otway v. Otway*, 13 Prob.

grounds for divorce, and have made no provision at all respecting recrimination. Under these circumstances, the courts assume that the legislature intended to adopt the general principles which had governed the ecclesiastical courts in England in granting divorces from bed and board, so far as these principles are applicable and are found to be reasonable.¹²⁷ In some states the subject of recrimination is covered by the statute, the legislature having undertaken to specify what conduct may be set up by way of recrimination; and, of course, in these states the statute is controlling.¹²⁸

The Conduct Constituting Ground for Recrimination.

In the English ecclesiastical courts the only conduct on the part of the complainant that could be set up in recrimination to defeat his right to a divorce was adultery.¹²⁹ And the same rule has been applied in some of our states.¹³⁰ The rule, however, is different under the modern English statutes;¹³¹ and, as will be seen, it is not recognized in the other states in this country, unless expressly declared by statute. The general rule in this country is, as stated by the Massachusetts court, that "a suitor for divorce cannot prevail if open to a valid charge, by way of recrimination, of any of the causes of divorce set out in the statute. Recrimination as a bar to divorce is not limited to a charge of the same nature as that alleged in the libel. It is sufficient if the recrimination charges any of the causes for divorce so declared in the statute. The general principle which governs in a case where one party recriminates is that recrimination must allege a cause which the law declares sufficient for a divorce."¹³² According to this rule, in a suit for divorce, whatever may be the ground alleged and relied upon, the defendant may set up by way of recrimination any conduct on the part of the

Div. 141; *Derby v. Derby*, 21 N. J. Eq. 36; *Hubbard v. Hubbard*, 74 Wis. 650, 43 N. W. 655.

¹²⁷ *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59; *Robbins v. Robbins*, 140 Mass. 528, 5 N. E. 837.

¹²⁸ Post, p. 206.

¹²⁹ *Harris v. Harris*, 2 Hagg. Ecc. 376, 411; *Cocksedge v. Cocksedge*, 1 Rob. Ecc. 90.

¹³⁰ *Bast v. Bast*, 82 Ill. 584; *Huling v. Huling*, 38 Ill. App. 144; *Richardson v. Richardson*, 4 Port. (Ala.) 467.

¹³¹ *Otway v. Otway*, 13 Prob. Div. 141.

¹³² *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 60.

complainant which the statute declares a ground for divorce; as, for instance, cruelty or desertion or drunkenness in a suit for divorce on the ground of adultery, and vice versa; or cruelty in a suit for divorce on the ground of desertion, and vice versa.¹³³

In *Pease v. Pease*,¹³⁴ a husband sued for divorce on the ground of his wife's adultery, and the wife was permitted to defeat the suit by showing, in recrimination, that he had been guilty of cruelty that would have entitled her to a divorce. "We do not perceive," said the court, "upon what logical principle the court could grant redress to the husband for the adultery of the wife when he himself has been guilty of an offense which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that, where one party is shown to have been guilty of adultery, such party cannot have a divorce for the adultery committed by the other."¹³⁵ * * * In the forum of conscience, adultery of the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery; but still the latter has ever been held a bar. And where both adultery and cruelty are

¹³³ *Hall v. Hall*, 4 Allen (Mass.) 39; *Clapp v. Clapp*, 97 Mass. 531; *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386; *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Hubbard v. Hubbard*, 74 Wis. 650, 43 N. W. 655; *Church v. Church*, 16 R. I. 667, 19 Atl. 244; *Nagel v. Nagel*, 12 Mo. 53; *Ryan v. Ryan*, 9 Mo. 539; *Shackett v. Shackett*, 49 Vt. 195; *Conant v. Conant*, 10 Cal. 249; *Johns v. Johns*, 29 Ga. 718; *Ribet v. Ribet*, 39 Ala. 348; *Holmes v. Holmes*, Walk. (Miss.) 474; *Adams v. Adams*, 17 N. J. Eq. 324; *Reid v. Reid*, 21 N. J. Eq. 331; *Harvey v. Harvey* (N. J. Ch.) 7 Atl. 871; *Wilson v. Wilson*, 40 Iowa, 230.

¹³⁴ 72 Wis. 136, 39 N. W. 133.

¹³⁵ *Proctor v. Proctor*, 2 Hagg. Const. 292; *Brisco v. Brisco*, 2 Add. Eec. 259; *Astley v. Astley*, 1 Hagg. Eec. 714; *Wood v. Wood*, 2 Paige (N. Y.) 108; *Smith v. Smith*, 4 Paige (N. Y.) 432; *Smith v. Smith*, 19 Wis. 522; *Mattox v. Mattox*, 2 Ohio, 233; *Christianberry v. Christianberry*, 3 Blackf. (Ind.) 202; *Horne v. Horne*, 72 N. C. 530; *Haines v. Haines*, 62 Tex. 216; *Flavell v. Flavell*, 20 N. J. Eq. 211; *Adams v. Adams*, 17 N. J. Eq. 324; *Reid v. Reid*, 21 N. J. Eq. 331.

made equal offenses, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike, and hold one a bar to the other."

It has been held that recrimination, to constitute a valid defense, must arise out of the fact that the acts or conduct for which the complainant seeks a divorce were induced by or in retaliation of complainant's conduct, relied upon in recrimination.¹³⁶ This, however, is contrary to the great weight of authority. To allow any such doctrine would exclude the charge of adultery by way of recrimination in a suit for divorce on the ground of adultery.

Same—Statutes Governing Recrimination.

In some of the states the subject of recrimination is entirely covered by the statutes, and no act can be set up by way of recrimination unless the case comes within the statute. In Minnesota it is provided that, "in any action brought for a divorce on the ground of adultery," the court may deny a divorce "when it is proved that the complainant has also been guilty of adultery." It has been held under this statute that the adultery of the complainant cannot be set up by way of recrimination, unless the adultery of the defendant is the ground of divorce relied upon.¹³⁷ In other words, under such a statute we have the absurd result that, while adultery by the husband will bar a suit by him for a divorce for the wife's adultery, it will not bar a suit by him for a divorce on the ground of some less heinous offense by the wife, such as desertion, cruelty, or drunkenness. It would have been better if the legislature had left the question to the courts to be determined on principle. So, in Pennsylvania, where a statute provided that if the defendant in a divorce suit should allege and prove certain things, they should be a good defense and a perpetual bar, it was held that no other defense than those mentioned in the statute could be interposed.¹³⁸

In a number of states it is expressly declared by statute, in ac-

¹³⁶ Trigg v. Trigg (Tex. Sup.) 18 S. W. 313.

¹³⁷ Buerfening v. Buerfening, 23 Minn. 563.

¹³⁸ Ristine v. Ristine, 4 Rawle (Pa.) 460.

cordance with the general rule obtaining both in England and in this country, even in the absence of statutory provision, that a divorce shall not be granted on the ground of adultery, when both parties are guilty of such an offense. In a few states it is provided that there shall be no divorce for any cause when the complainant was guilty of "like conduct." If such a statute is to be strictly construed, the only acts that can be set up by way of recrimination would be adultery when, and only when, a divorce is sought on the ground of adultery; desertion when a divorce is sought on the ground of desertion; cruelty when a divorce is sought on the ground of cruelty, etc.¹³⁹ It is doubtful, however, whether the statute should be so strictly construed, for the words "like conduct" might well be taken to mean conduct constituting ground for divorce.¹⁴⁰

Same—Conduct Condoned.

As to whether an offense which has been condoned can be set up by way of recrimination, there has been some conflict in the authorities. Perhaps in no case has the offense of cruelty or desertion been allowed as a defense after condonation. The conflict has arisen in the case of adultery. In England, by statute, the courts are given a discretionary power to refuse a divorce on the ground of adultery, if the complainant has been guilty of adultery during the marriage; and some of the judges have, in the exercise of this discretion, refused a divorce on the ground of adultery, because of adultery by the complainant which the defendant had condoned.¹⁴¹ Authorities in New York are to the same effect.¹⁴² By the better opinion, however, both in England and in this country, and whether there is any statute on the subject or not, adultery by one spouse, if it has been condoned by

¹³⁹ There have been, and perhaps there are now, such statutes in Michigan, Nebraska, Wyoming, and Arizona. Stim. Am. St. Law, § 6217.

¹⁴⁰ See *Hoff v. Hoff*, 48 Mich. 281, 12 N. W. 160. In this case the divorce was asked on the ground of extreme cruelty, and extreme cruelty was the conduct set up by way of recrimination, so that it was strictly within the words of the statute. But the language of the court makes it clear that the broader view was taken of the statute. And see *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903.

¹⁴¹ *Seller v. Seller*, 1 Swab. & T. 482; *Goode v. Goode*, 2 Swab. & T. 253.

¹⁴² *Wood v. Wood*, 2 Paige (N. Y.) 108; *Morrell v. Morrell*, 1 Barb. (N. Y.) 318.

the other, is no bar to a suit for a divorce for the subsequent adultery of the other.¹⁴³ An offense, when it is condoned, ceases to be a ground for a divorce, and for this reason, if for no other, it is not ground for recrimination. The question was fully considered by the Massachusetts court in *Cumming v. Cumming*; ¹⁴⁴ and after a review of the authorities, and the reasons for the rule, it was held that the court should exercise no discretion in the matter, but should apply the rule in all cases. Even where a statute expressly provides, as it does in some states, that a divorce shall not be granted on the ground of adultery where both parties have been guilty, it does not seem that the statute should be construed as applying to adultery that has been condoned.¹⁴⁵

LEGISLATIVE DIVORCE.

109. In the absence of constitutional restrictions, the legislature of a state has the power to grant divorces by special act; and such an act is not within the constitutional prohibition against laws impairing the obligation of contracts.

The English ecclesiastical courts were limited to the granting of divorces from bed and board, and could not grant a divorce a vinculo matrimonii. This power, however, was exercised by parliament; and, when this country was settled, the legislative assemblies of the colonies followed the example of parliament, and treated the subject as

¹⁴³ *Cumming v. Cumming*, 135 Mass. 386; *Anichini v. Anichini*, 2 Curt. Ecc. 210; *Jones v. Jones*, 18 N. J. Eq. 33; *Masten v. Masten*, 15 N. H. 159. See *Bleck v. Bleck*, 27 Hun (N. Y.) 296. In *Cumming v. Cumming*, supra, the rule was applied in the adultery by the wife, which had been condoned by the husband. "An act of adultery committed by the husband, and forgiven for years, should not be held to compel the husband to submit without redress to the faithlessness and unrestrained profligacy of his wife. The penalty is too severe for a forgiven offense. It is better to hold that, when the erring party is received back and forgiven, the marriage contract is renewed, and begins as *res integra*, and that it is for the party, and not for the courts, to forgive the new offense." *Jones v. Jones*, supra.

¹⁴⁴ 135 Mass. 386.

¹⁴⁵ See dictum in *Cumming v. Cumming*, supra, and in *Jones v. Jones*, supra.

within their province. Since then divorces a vinculo have been granted by special act of the legislature in very many of the states. In some states the power of the legislature to grant divorces is restricted by constitutional provisions.¹⁴⁶ In the absence of such restrictions, however, it is well settled that the power exists. In a late case the question came before the supreme court of the United States; and it was held that a special act of a territorial legislature dissolving the marriage relation between a husband resident in the territory and a wife who was a nonresident was a valid act of legislative power, and that it was not rendered invalid by the fact that there was no cause for divorce, and that the wife was not notified.¹⁴⁷ It was also held that such an act does not violate the clause of the federal constitution prohibiting laws impairing the obligation of contracts, since marriage is not a contract, within the meaning of that provision.¹⁴⁸

¹⁴⁶ Sparhawk v. Sparhawk, 116 Mass. 315; State v. Fry, 4 Mo. 120.

¹⁴⁷ Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723; Cronise v. Cronise, 54 Pa. St. 255; Crane v. Meginnis, 1 Gill & J. (Md.) 474; Starr v. Pease, 8 Conn. 541; Bingham v. Miller, 17 Ohio, 445; State v. Duket, 90 Wis. 272, 63 N. W. 83.

¹⁴⁸ Maynard v. Hill, *supra*.

PART II.

PARENT AND CHILD.

CHAPTER VIII.

LEGITIMACY, ILLEGITIMACY, AND ADOPTION.

110-111. Legitimacy of Children.

112. Adoption of Children.

113. Status of Illegitimate Children.

Persons occupying the relation of parent and child have certain rights, and are subject to certain duties and obligations, which arise from the legal status established by that relation. This status exists only between the parent and his legitimate children and his children by adoption. Before explaining these rights, duties, and obligations, therefore, it is necessary to show what constitutes legitimacy, and how the relation of parent and child may arise from adoption. In this chapter will also be considered the status of parent and illegitimate child, and the rights and duties which arise from that relation.

LEGITIMACY OF CHILDREN.

110. A child is legitimate at common law when it was born or begotten during the lawful wedlock of its parents, and very generally, by statute in this country, when its parents marry subsequent to its birth.

111. There is a strong presumption that the child of a married woman is legitimate; but this is a presumption of fact, and may be rebutted by clear and convincing evidence that her husband is not its father.

"A legitimate child," says Blackstone, "is he that is born in lawful wedlock, or within a competent time afterwards. 'Pater est quem nuptæ demonstrant,' is the rule of the civil law; and this holds with the civilians, whether the nuptials happen before or after the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth."¹ A child, to be legitimate, need not

¹ 1 Bl. Comm. 446.

necessarily have been begotten during wedlock. It is sufficient if he was born after, though begotten before, marriage.² In *Rex v. Luffe*,³ Lord Ellenborough said that, "with respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." "A bastard, by our English laws," says Blackstone, "is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our law; which, though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition, to make it legitimate, that it shall be born, after lawful wedlock."⁴ Of course, all children born so long after the death of the husband that, by the usual course of gestation, they could not possibly have been begotten by him, are illegitimate; and, generally, all children are illegitimate if it is clearly shown by the circumstances that the husband could not have been or is not their father.

It will be noticed from what has been said that, according to the civil law, children not only begotten, but born, before the marriage of their parents, are rendered legitimate by the marriage. The rule of the common law to the contrary is still in force in England, and in some of our states;⁵ but in most states statutes have been enacted providing, in accordance with the civil law, that the marriage

² *Rex v. Luffe*, 8 East, 198; *Stegall v. Stegall*, 2 Brock. 256, Fed. Cas. No. 13,351; *Dennison v. Page*, 29 Pa. St. 420; *Bowles v. Bingham*, 2 Munf. (Va.) 442; 3 Munf. (Va.) 599; *State v. Wilson*, 10 Ired. (N. C.) 131; *State v. Herman*, 13 Ired. (N. C.) 502.

³ 8 East, 198.

⁴ 1 Bl. Comm. 454.

⁵ *Eversley*, Dom. Rel. 526. It is held in England that a child born before marriage, though made legitimate according to the laws of the country of his birth, per subsequens matrimonium, cannot inherit land in England. *Birtwhistle v. Vardill*, 7 Clark & F. 895. The rule in this country, however, is different. *Miller v. Miller*, 91 N. Y. 315.

of parents shall render legitimate, for all purposes, a child born before the marriage. And such a statute is perfectly valid.⁶ In a number of states, also, by statute, the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such into his family, and otherwise treating it as if legitimate, thereby renders it legitimate for all purposes.⁷ And in Michigan, by statute, if the father, by writing executed, acknowledged, and recorded like deeds of real estate, but with the judge of probate, acknowledge such child, it is legitimate for all purposes.⁸ There are various other statutory provisions in the different states by which illegitimate children may be rendered legitimate. In a few states the putative father of a bastard has a process in court by which he may legitimate the child.⁹ In some of the states illegitimate children who have been rendered legitimate under statutory provisions are called "legitimated" children. Statutes allowing illegitimate children to inherit, or otherwise clothing them with the status and rights of a legitimate child, are perfectly valid, for the legislature has the right to change the common law in this respect.¹⁰ Such statutes, being in derogation of the common law, should be strictly construed; but the courts cannot refuse to give full effect to the clear intention of the legislature, as evidenced by the language of the statute.¹¹

At common law, if a marriage is void, the children of such a marriage are illegitimate, though the parties in marrying may have acted in the most perfect good faith.¹² So it is, also, where a marriage is voidable and avoided by disaffirmance, or by a decree of nullity in the lifetime of the parties, so as to render it void ab initio on such disaffirmance or the entry of such a decree.¹³ These were harsh rules, and in most states they have been greatly modified by statute. In some states the statute is very broad. In Wisconsin, for instance,

⁶ Stim. Am. St. Law, § 6631. See *Miller v. Miller*, 91 N. Y. 315.

⁷ Stim. Am. St. Law, § 6632. See *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915; *Id.*, 102 Cal. 254, 36 Pac. 522.

⁸ How. Ann. St. § 5775a.

⁹ Stim. Am. St. Law, § 6633.

¹⁰ *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222; *Miller v. Miller*, 91 N. Y. 315.

¹¹ *Cope v. Cope*, *supra*.

¹² Ante, pp. 27, 35, 38.

¹³ Ante, p. 38.

the statute declares that "the issue of all marriages declared null in law shall, nevertheless, be legitimate." Such a statute, said the Wisconsin court, means "that a child born within the wedlock of a regular marriage, which is null in law, shall, nevertheless, be the legitimate child and heir of each and both parents, so far as the question of legitimacy is concerned. In other words, all such children are legitimate to all intents and purposes. It is a very just and humane provision, and serves to mitigate somewhat the severity of the old law, which visited upon the children the sins of their parents." In the case from which we have quoted, therefore, it was held that a child born within the wedlock of a regular marriage, which is void in law because the woman is already married, is, nevertheless, the legitimate child and heir of both parents.¹⁴

Conflict of Laws.

By the great weight of authority, the legitimacy of a child, not only for the purpose of determining whether he can inherit, but for all other purposes, is to be determined by the law of the place where he was born and the parents were domiciled.¹⁵ A child, therefore, that is illegitimate in the place of its birth, is incapable of inheriting in another state, though, if he had been born in the latter state, he would be capable of inheriting.¹⁶ On the other hand, if an illegitimate child has, by the subsequent marriage of his parents, been rendered legitimate under a statute of the state in which he was born and his parents were domiciled, he will be recognized as legitimate for all purposes in another state, in which there is no such statute.¹⁷ Some of the cases are in conflict with this doctrine. Thus, it has been held in some jurisdictions that a person cannot inherit land in one state or country if he is illegiti-

¹⁴ *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720. And see *Lincecum v. Lincecum*, 3 Mo. 441; *Dyer v. Brannock*, 66 Mo. 391; *Green v. Green*, 126 Mo. 17, 28 S. W. 752; *Glass v. Glass*, 114 Mass. 563; *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260; *Hiram v. Pierce*, 45 Me. 367; *Earle v. Dawes*, 3 Md. Ch. 230; *Hartwell v. Jackson*, 7 Tex. 576; *Graham v. Bennet*, 2 Cal. 503; *Heckert v. Hile's Adm'r*, 90 Va. 390, 18 S. E. 841.

¹⁵ *Story*, *Conf. Law*, § 87 et seq.; *Smith v. Kelly's Heirs*, 23 Miss. 167; *Miller v. Miller*, 91 N. Y. 315; *Shedden v. Patrick*, 5 Paton, 194; *Ross v. Ross*, 129 Mass. 243, and cases there collated.

¹⁶ *Smith v. Kelly's Heirs*, *supra*.

¹⁷ *Miller v. Miller*, *supra*; *Scott v. Key*, 11 La. Ann. 232.

mate by the laws of that state or country, though he may be legitimate by the laws of the state or country in which he was born, and in which he and his parents are domiciled.¹⁸

Presumption of Legitimacy—Evidence.

The child of a married woman is presumed to be legitimate, in the absence of evidence that the husband is not its father. This presumption is very strong, and will not, as a rule,¹⁹ be rebutted by anything less than clear and convincing proof that sexual intercourse did not take place between the father and mother at any time when, in the course of nature, the husband might have been the father of the child, or that the father and mother were not legally married.²⁰ This presumption is one of fact, and not of law, and may always be rebutted by showing that, in fact, the husband could not have been the father. The presumption is clearly rebutted, for instance, if it is shown that the husband was physically

¹⁸ *Burtwhistle v. Vardill*, 6 Bing. N. C. 385 (as to this case, see *Ross v. Ross*, 129 Mass. 243); *Smith v. Derr's Adm'rs*, 34 Pa. St. 126; *Lingen v. Lingen*, 45 Ala. 410.

¹⁹ See post, p. 220, as to rebuttal of presumption of legitimacy even where intercourse by the husband is shown to have taken place.

²⁰ *Head v. Head*, 1 Sim. & S. 150; *Banbury Peerage Case*, Id. 153; *Pendrell v. Pendrell*, 2 Strange, 925; *Hargrave v. Hargrave*, 9 Beav. 552; *Bury v. Philbot*, 2 Mylne & K. 349; *Plowes v. Bossey*, 31 Law J. Ch. 681; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430; *Hemmenway v. Towner*, 1 Allen (Mass.) 209; *Phillips v. Allen*, 2 Allen (Mass.) 453; *Strode v. Magowan's Heirs*, 2 Bush (Ky.) 627; *Wright v. Hicks*, 15 Ga. 160; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Patterson v. Gaines*, 6 How. 550; *Cross v. Cross*, 3 Paige (N. Y.) 139; *Fox v. Burke*, 31 Minn. 319, 17 N. W. 861; *Kleinert v. Ehlers*, 38 Pa. St. 439; *Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498; *In re Picken's Estate*, 163 Pa. St. 14, 29 Atl. 875. In *Strode v. Magowan's Heirs*, supra, it is said: "The law presumes that every child in a Christian country is prima facie the offspring of a lawful, rather than a meretricious union of the parents, and that, consequently, the mother, either by actual marriage, or by cohabitation and recognition, was the lawful wife of the father; and, in the absence of any negative evidence, no supplemental proof of legal marriage will be necessary to legitimate the offspring. Mere rumor is insufficient to bastardize issue, or require positive proof of actual marriage. If the presumption be false, repellant facts may be generally established; and, if no such facts can be clearly proved, the presumption from mere filiation should stand."

incapable of sexual intercourse, so that he could not have begotten the child;²¹ or that he was beyond the seas, or, though not beyond the seas, that he was away from his wife, so that he could not have had intercourse with her during the time when, in the course of nature, the child must have been begotten.²²

If access by the husband is shown, there is a very strong presumption of intercourse; and if there was intercourse at such a time that the child could, in the course of nature, have been begotten by him, the presumption is almost conclusive that he is the father.²³ "The modern rule, which is marked out by its good sense, is that, to bastardize the issue of a married woman, it must be shown beyond all reasonable doubt that there was no such access as could have enabled the husband to be the father of the child. The rules of law, as laid down by the judges on the questions propounded to them by the house of lords, in the Banbury Peerage Case,²⁴ are substantially these: Sexual intercourse is to be presumed where personal access is not disproved, unless such presumption is rebutted by satisfactory evidence to the contrary; and, where sexual intercourse is presumed or proved, the husband must be taken to be the father of the child, unless there was a physical or natural impossibility that such intercourse should have produced such child."²⁵

Mere proof of the wife's adultery is not sufficient to rebut the

²¹ Banbury Peerage Case, 1 Sim. & S. 153; *Rex v. Luffe*, 8 East, 193, 207; *Hargrave v. Hargrave*, 9 Beav. 552.

²² Banbury Peerage Case, *supra*; *Head v. Head*, 1 Sim. & S. 150; *Bosville v. Attorney General*, 12 Prob. Div. 177. In the last case it was in evidence that the usual period of gestation is 270 to 275 days, and that the child was born 276 or 277 days after the last opportunity for intercourse between the husband and wife. There was also evidence that it might have been the child of another. The jury found against legitimacy, and the court refused to set the verdict aside. This decision illustrates and sustains the proposition stated in the text, but clearly it goes too far, and allows too slight evidence to rebut the presumption of legitimacy; for it is a well-known fact that the period of gestation may extend far beyond 277 days. Perhaps the evidence that another man had intercourse with the wife may have had controlling weight.

²³ Banbury Peerage Case, 1 Sim. & S. 153; *Head v. Head*, *Id.* 150; *Rex v. Luffe*, 8 East, 193; *Cross v. Cross*, 3 Paige (N. Y.) 139.

²⁴ 1 Sim. & S. 153.

²⁵ *Cross v. Cross*, *supra*.

presumption, in the absence of any other evidence going to show that her husband could not have begotten the child. "Although actual adultery with other persons is established at or about the commencement of the usual period of gestation, yet if access by the husband has taken place, so that, by the laws of nature, he may be the father of the child, it must be presumed to be his, and not the child of the adulterer."²⁶

By the early common law of England, the rule was that the husband must be conclusively presumed to be the father of his wife's children born during wedlock, if he was within the four seas at any time during the period of his wife's gestation, and was not physically incapable of procreation. To such an absurd length was the doctrine carried that it was decided that a child born in England was legitimate, although it clearly appeared that the husband resided in Ireland during the whole time of his wife's pregnancy, and for a long time previously, because Ireland was within the king's dominion.²⁷ This absurd doctrine was exploded by Lord Raymond in *Pendrell v. Pendrell*,²⁸ in 1732, where he held that the legal presumption of access by the husband might be controverted.²⁹ And the rule now is well settled, both in England and in this country, that the presumption is in all cases a presumption of fact, and not a presumption of law, and may always be rebutted; and, further than this, that it may be rebutted even where access by the husband is shown.³⁰ And the presumption may be rebutted, not only by showing physical incapacity, as stated above, but by any other legitimate evidence, including the conduct of the parties, which clearly shows that there was no intercourse.³¹ In *Cope v. Cope*,³² where the

²⁶ *Cross v. Cross*, 3 Paige (N. Y.) 139; *Wright v. Hicks*, 15 Ga. 160; *Bury v. Phillpot*, 2 Mylne & K. 349; *Hemmenway v. Towner*, 1 Allen (Mass.) 209.

²⁷ *Wright v. Hicks*, 12 Ga. 155, where the ancient rule is shown by Lumpkin, J. And see Co. Litt. 244a; *Reg. v. Murrey*, 1 Salk. 122.

²⁸ 2 Strange, 925.

²⁹ *Wright v. Hicks*, *supra*.

³⁰ *Pendrell v. Pendrell*, 2 Strange, 925; *Wright v. Hicks*, 12 Ga. 155, 15 Ga. 160; *Cross v. Cross*, 3 Paige (N. Y.) 139; and cases hereafter cited.

³¹ 2 Kent, Comm. 211; *Hargrave v. Hargrave*, 9 Beav. 552; *Plowes v. Bossey*, 31 Law J. Ch. 681; *Head v. Head*, 1 Sim. & S. 150; *Rex v. Luffe*,

³² 1 Moody & R. 269.

husband and wife were living separate, and the wife in open adultery, the court said that, "although the husband and wife have an opportunity for access, it would be monstrous to suppose that under such circumstances he would avail himself of such opportunity. The legitimacy of a child, therefore, born under such circumstances, could not be established." In *Wright v. Hicks*,³³ it is said by Lumpkin, J.: "The law now is universally understood to be clearly settled that, although the birth of a child during wedlock raises a presumption that such child is legitimate, yet that this presumption may be rebutted both by direct and presumptive evidence. And, in arriving at a conclusion upon this subject, the jury may not only take into their consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct and of declarations connected with conduct, and to any induction which reason suggests, for determining upon the probabilities of the case. Where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is the fruit; but it is only a very strong presumption, and no more. This presumption may be rebutted by evidence, and it is the duty of the jury to weigh the evidence against the presumption, and to decide as, in the exercise of their judgment, either may appear to preponderate."

Even where there was intercourse by the husband, actually shown or presumed from access in the absence of evidence to the contrary, the presumption of legitimacy may still be rebutted by circumstances showing that it was a natural impossibility that the husband could be the father of such a child; as, for instance, where the wife and husband are white persons, and an adulterous intercourse is shown to have existed between the wife and a negro at or about the time when the child must have been begotten, and the

8 East, 193, 207; *Morris v. Davis*, 5 Clark & F. 163; *Aylesford Peerage Case*, 11 App. Cas. 1; *Wright v. Hicks*, 12 Ga. 155, 15 Ga. 160; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Cannon v. Cannon*, 7 Humph. (Tenn.) 410; *Cope v. Cope*, 1 Moody & R. 269.

³³ 12 Ga. 155, 15 Ga. 160.

color and other physiological developments of the child demonstrate its African paternity.⁸⁴

The policy of the law does not allow either the husband or the wife to testify as to the fact of access or nonaccess, whether the testimony relates to access before or after marriage. "Nonaccess cannot be proved by either the husband or the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law."⁸⁵ In *Goodright v. Moss*,⁸⁶ where the question of legitimacy arose in an action of ejectment, Lord Mansfield said: "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality, and policy that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious."

ADOPTION OF CHILDREN.

112. By statute, in most jurisdictions, but not at common law, a person may adopt a child; and in such a case, unless there are statutory provisions to the contrary, the rights, duties, and obligations arising from the artificial relation will be substantially the same as those arising from the natural relation of parent and child.

The legal adoption by one person of the offspring of another, giving him the status of a child by adoption, was unknown to the common law.⁸⁷ It was recognized, however, by the Roman law, and

⁸⁴ See *Whisterlo's Case*, cited in *Cross v. Cross*, 3 Paige (N. Y.) 139; *Wright v. Hicks*, 12 Ga. 155; *Bullock v. Knox*, 96 Ala. 195, 11 South. 339.

⁸⁵ *Dennison v. Page*, 29 Pa. St. 420. And see *Rex v. Luffe*, 8 East, 198; *Rex v. Rook*, 1 Wils. 340; *Goodright v. Moss*, 2 Cowp. 591; *Parker v. Way*, 15 N. H. 45; *People v. Overseers of Poor*, 15 Barb. (N. Y.) 286; *Mink v. State*, 60 Wis. 583, 19 N. W. 445; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654. And the rule also applies so as to exclude declarations of husband or wife, unless they are admissible because connected with, and explanatory of, conduct. *Bowles v. Bingham*, 2 Munf. (Va.) 442.

⁸⁶ 2 Cowp. 591.

⁸⁷ "The law of England, strictly speaking, knows nothing of adoption, and

exists in many countries on the continent of Europe, which derive their jurisprudence from that law. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, into most of the other states.³⁸

These statutes vary widely in the different states, and therefore no general statement of their provisions can be made. They generally prescribe what persons may adopt,—as any person being an inhabitant of the state, aged 21, or, in some states of a greater age; any person competent to make a will; any adult, etc. In most states the adopting person's husband or wife, if he or she is married, must consent. The statutes also prescribe the persons who may, and those who may not, be adopted. The process by which the adoption may be effected is also prescribed,—as by petition to the court in some states, or by deed in others, etc. If the child has natural parents living, their consent, except under particular circumstances, is generally required. As the right to adopt depends entirely upon the statute, its provisions must be strictly complied with.

Status of Adoptive Parent and Child.

Where the artificial relation of parent and child is created by adoption under the statutes, the relation will, by the express provisions of most of the statutes, and even independently of such express provision, give rise to substantially the same rights, duties, and liabilities as arise out of the natural relation. The law cannot, and does not purport to, do the work of nature, and create one a child who by nature is a stranger. But it can and does fix the status of the adoptive child to the adoptive parent as substantially the same as the status of a natural child. By the act of

does not recognize any rights, claims, or duties arising out of such a relation, except as arising out of an express or implied contract. But, in so far as the court of chancery will, in the interests of the children, enforce the waiver or abandonment of the control of the father (or mother), up to that point it might be said to countenance the claim of the adoptive parent, not on the ground of any right in the latter, but of the material well-being of the infant." Eversley, Dom. Rel. 539. And see *Ross v. Ross*, 129 Mass. 243, 262.

³⁸ *Ross v. Ross*, *supra*.

adoption, the child becomes, in a legal sense, the child of the adoptive parent. The general effect of adoption, therefore, is, with few exceptions, to place the parties in the legal relation of parent and child, with all the legal consequences. The law declares the status, and from the status, as a necessary consequence, spring the ordinary rights, duties, and liabilities which arise out of the same status created by nature.³⁹

The natural parents are divested of all personal rights in respect to the child, and are relieved of all legal duties as its parents. They lose, for instance, and the adoptive parent acquires, the right to the child's custody and control, and to its services and earnings;⁴⁰ and they are relieved from, and the adoptive parent assumes, the duties of maintenance, education, etc.

The right of inheritance by and from adopted children is very generally regulated by the statutes, and the statutes, in this as in other respects, vary in the different states. In many states the adopted child becomes the heir of the adoptive parent in all respects as if he were a natural child,⁴¹ except, generally, that he cannot take, by representation, from the adoptive parent's kindred, either lineal or collateral.⁴² In some states it is expressly provided that he can also inherit from his natural parents or kindred, though such a provision would not be necessary to so entitle him.⁴³ In a few states the statute provides expressly for inheritance by the adopting from the adopted person. In some states, by express provision, adoption has no effect whatever upon the rights of inheritance or descent.

³⁹ *Humphries v. Davis*, 100 Ind. 274; *Paul v. Davis*, Id. 422; *Lunay v. Vantyne*, 40 Vt. 503; *Sewall v. Roberts*, 115 Mass. 262; *Burrage v. Briggs*, 120 Mass. 103; *Rives v. Sneed*, 25 Ga. 612; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962.

⁴⁰ *Lunay v. Vantyne*, *supra*.

⁴¹ See *Barnes v. Allen*, 25 Ind. 222; *Davis v. Krug*, 95 Ind. 1; *Humphries v. Davis*, 100 Ind. 274; *Sewall v. Roberts*, 115 Mass. 262; *Ross v. Ross*, 129 Mass. 243; *Wagner v. Varner*, 50 Iowa, 532; *Keegan v. Geraghty*, 101 Ill. 26; *Glos v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Com. v. Nancrede*, 32 Pa. St. 389; *Schafer v. Eneu*, 54 Pa. St. 304; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962.

⁴² See *Keegan v. Geraghty*, 101 Ill. 26.

⁴³ *Wagner v. Varner*, 50 Iowa, 532; *Humphries v. Davis*, 100 Ind. 274.

As to the right of inheritance by and from adopted persons, where the statute is silent on the subject, the authorities are not very clear. In Indiana, where the statute was silent on this question, it was held, after a thorough consideration, and a full review of the authorities, that where an adopted child acquires property by inheritance, not from his natural parents or kindred, but from his adoptive mother, such property, on the death of the child, will go to his adoptive father, to the exclusion of his natural parents or kindred.⁴⁴ The court was influenced by the consideration that this was only just, in view of the fact that the property had been acquired by the child from its adoptive parent, and not from its natural parent, and that equity has a potent influence in the construction of statutes. It was also considered, however, on principle and on authority, that this result followed necessarily from the legal status of adoptive parent and child. The status of an adopted child, it was said, for all legal purposes, and as to property inherited by it from an adoptive parent, is that of a natural child.

In the case just referred to, the court expressly limited its decision to the facts, and it was intimated, if not virtually conceded, that property inherited by a child from its natural parent would go back to its natural kindred, to the exclusion of its adoptive parent; and in some case it has been expressly so held.⁴⁵

In Missouri it was held that, though the legal relation of parent and child exists between adoptive parent and child, yet, as the statute vests the right of inheritance in the child only, the adoptive parent cannot inherit from the adopted child; and that, even where the child has acquired property from an adoptive parent under the statute, the property, on the child's death intestate, goes to its natural parents or kinsmen.⁴⁶ But this decision has been very justly criticised.⁴⁷

In Massachusetts the doctrine that the legal status of adoptive parent and child is the same in substance as that of natural parent

⁴⁴ *Humphries v. Davis*, 100 Ind. 274 (collecting and reviewing the cases). But see *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617.

⁴⁵ *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617. And see dictum in *Humphries v. Davis*, 100 Ind. 274.

⁴⁶ *Reinders v. Koppelman*, 68 Mo. 482.

⁴⁷ *Humphries v. Davis*, 100 Ind. 274.

and child was carried so far as to hold that an adopted child took as a child under a residuary clause of the adoptive father's will, where the specific legacy had lapsed.⁴⁸

STATUS OF ILLEGITIMATE CHILDREN.

113. The natural relation between a parent and his illegitimate children does not, at common law, give rise to those rights and duties which pertain to the legal status of parent and child. But to some extent the law recognizes bastards as children. Thus:
- (a) The mother is entitled to the custody and services of her illegitimate child, as against the father or strangers; but the welfare of the child may require the court to award its custody to another.
 - (b) The child's domicile is determined by that of its mother.
 - (c) At common law, a bastard cannot inherit, and can have no heir except of his own body; but this rule has been to a great extent modified by statute.
 - (d) The putative father is under no legal obligation to support his illegitimate child, but now, by statute, he may very generally be compelled to do so.

The relation between a parent and his illegitimate offspring does not give rise to the rights and obligations arising from the relation of a parent and his legitimate child. At least, it is so at common law.⁴⁹ In the absence of statutory provision, the common law scarcely recognizes the father of a bastard, if, indeed, it recognizes him at all. The courts, however, for some purposes, do recognize the blood relationship between a bastard and its mother. They recognize the mother's right to the custody and control of it, and will generally award her the custody as against strangers, and even as against the father.⁵⁰ The mother can also transfer her

⁴⁸ *Burrage v. Briggs*, 120 Mass. 103.

⁴⁹ *Simmons v. Bull*, 21 Ala. 501.

⁵⁰ *Reg. v. Nash*, 10 Q. B. Div. 454; *Reg. v. Barnardo*, 24 Q. B. Div. 283; *Ex parte Knee*, 1 Bos. & P. (N. R.) 148; *Marshall v. Reams*, 32 Fla. 499, 14 South.

rights in this respect to another.⁵¹ The rights of the mother, however, or of one to whom she has transferred the custody of the child, are not absolute and beyond control. As in the case of a legitimate child, so in the case of a bastard, the welfare of the child will be the controlling consideration, where a question arises as to its custody.⁵² The rules applicable in the case of legitimate children⁵³ are equally applicable here. On the death of the mother of a bastard, it becomes an orphan in law, even though its father is living, and claims its custody.⁵⁴

The domicile of a bastard is determined by that of its mother.⁵⁵ In the absence of proof of her domicile, the child will be presumed to be settled in the place of its birth.⁵⁶

At common law the rights of an illegitimate child are few. Blackstone says: "The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called '*filius nullius*,' sometimes '*filius populi*.'" ⁵⁷ At common law he cannot inherit property from any one, for, while his blood relationship to his mother is recognized for certain purposes, he has no legal status as child and heir.⁵⁸ Nor can he have heirs except of his own body.⁵⁹ "A bas-

95; *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. 257; *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247; *Wright v. Wright*, 2 Mass. 109; *Carpenter v. Whitman*, 15 Johns. (N. Y.) 208; *Com. v. Fee*, 6 Serg. & R. (Pa.) 255; *Town of Hudson v. Hills*, 8 N. H. 417; *Lawson v. Scott*, 1 Yerg. (Tenn.) 92; *Alfred v. McKay*, 36 Ga. 440; *Pratt v. Nitz*, 48 Iowa, 33.

⁵¹ *Marshall v. Reams*, *supra*.

⁵² *Reg. v. Nash*, *supra*; *Marshall v. Reams*, *supra*; *In re Lloyd*, 3 Man & G. 547.

⁵³ *Post*, p. 246.

⁵⁴ *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. 257.

⁵⁵ 2 Kent, Comm. 214; *Dicey*, Dom. 5.

⁵⁶ *Guardians of Headington Union v. Guardians of Ipswich Union*, 25 Q. B. Div. 143.

⁵⁷ 1 Bl. Comm. 459.

⁵⁸ 1 Bl. Comm. 459; 2 Kent, Comm. 213; *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153. The civil law was different as regards inheritance from the mother. *Pettus v. Dawson*, 82 Tex. 18, 17 S. W. 714.

⁵⁹ 1 Bl. Comm. 459; 2 Kent, Comm. 213; *Cooley v. Dewey*, 4 Pick. (Mass.) 93; *Stover v. Boswell's Heir*, 3 Dana (Ky.) 233; *Barwick v. Miller*, 4 Desaus. Eq. (S. C.) 434; *Bent's Adm'r v. St. Vrain*, 30 Mo. 268; *Croan v. Phelps' Adm'r*, 94 Ky. 213, 21 S. W. 874.

tard," says Kent, "being, in the eye of the law, nullius filius, or, as the civil law, from the difficulty of ascertaining the father, equally concluded, patrem habere non intelliguntur, he has no inheritable blood, and is incapable of inheriting as heir, either to his putative father, or his mother, or to any one else; nor can he have heirs but of his own body. The rule of the common law, so far at least as it excludes him from inheriting as heir to his mother, is supposed to be founded partly in policy, to discourage illicit commerce between the sexes."⁶⁰

The harsh rules of the common law, in so far as they rendered a bastard incapable of inheriting as heir, and of having heirs except of his own body, have been greatly modified by statute in this country. In most states it is now provided by statute that bastards shall inherit from or through their mother share and share alike with her legitimate children.⁶¹ "This relaxation in the laws of so many of the states, of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity."⁶² So, also, in most states, by statute, bastards may not only have heirs of their own body, as at common law, but they may transmit to their mother and her kin, as if legitimate.⁶³ In some states, bastards may not only inherit from their mother, but they may represent her so as to inherit

⁶⁰ 2 Kent, Comm. 213.

⁶¹ Stim. Am. St. Law, § 3151. See *Alexander's Adm'r v. Alexander*, 31 Ala. 241; *Neil's Appeal*, 92 Pa. St. 193; *Stover v. Boswell's Heir*, 3 Dana (Ky.) 233; *Jackson v. Collins*, 16 B. Mon. (Ky.) 214; *McGuire v. Brown*, 41 Iowa. 650.

⁶² 2 Kent, Comm. 213.

⁶³ Stim. Am. St. Law, § 3154. See *Garland v. Harrison*, 8 Leigh (Va.) 368; *Neil's Appeal*, 92 Pa. St. 193; *Dickinson's Appeal*, 42 Conn. 491; *Ellis v. Hatfield*, 20 Ind. 101; *Nolasco v. Lurty*, 13 La. Ann. 100; *Remington v. Lewis*, 8 B. Mon. (Ky.) 606; *Blankenship v. Ross*, 95 Ky. 306, 25 S. W. 268. A statute providing that "bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother" does not provide for the transmission of a bastard's estate through the mother, and on to her collateral kindred. *Croan v. Phelps' Adm'r*, 94 Ky. 213, 21 S. W. 874. See, also, *Blair v. Adams*, 59 Fed. 243.

from her kin.⁶⁴ In other states they cannot inherit except from the mother.⁶⁵ In some states, on the failure of legitimate heirs, a bastard may inherit from his father.

At common law the father is under no legal obligation to maintain his illegitimate children, for as has been seen, in the eye of the common law, an illegitimate child has no father, but is regarded as *nulius filius*.⁶⁶ But the father is liable on an express promise to pay for support and maintenance to be furnished to his illegitimate children, and on an implied contract to pay therefor where he has adopted the child as his own, and acquiesced in any particular disposition of it.⁶⁷ It has been held that the mother, even in the absence of a statute, is bound to maintain her illegitimate child.⁶⁸

In England, and in most of our states, statutes have been enacted making the father chargeable with the maintenance of his illegitimate children, for the purpose of relieving the parish or county of the expense. And in most states, by statute, the mother has a com-

⁶⁴ See *Doe v. Bates*, 6 Blackf. (Ind.) 533; *Waggoner v. Miller*, 4 Ired. (N. C.) 480; *Keech v. Enriquez*, 28 Fla. 597, 10 South. 91.

⁶⁵ See *Jackson v. Jackson*, 78 Ky. 390; *Brown v. Kerby*, 9 Humph. (Tenn.) 460. A statute making bastards capable of inheriting "on the part of their mother" does not enable a bastard to inherit from collateral kindred of his mother. *Williams v. Kimball*, 35 Fla. 49, 16 South. 783.

⁶⁶ *Moncrief v. Ely*, 19 Wend. (N. Y.) 405; *Todd v. Weber*, 95 N. Y. 181; *Simmons v. Bull*, 21 Ala. 501; *Glidden v. Nelson*, 15 Ill. App. 297; *Nine v. Starr*, 8 Or. 49; *Wiggins v. Keizer*, 6 Ind. 252; *Duncan v. Pope*, 47 Ga. 445.

⁶⁷ *Todd v. Weber*, 95 N. Y. 181, and cases cited therein; *Knowlman v. Bluett*, L. R. 9 Exch. 307; *Hicks v. Gregory*, 19 Law J. C. P. 81; *Wiggins v. Keizer*, 6 Ind. 252; *Moncrief v. Ely*, 19 Wend. (N. Y.) 405; *Birdsall v. Edgerton*, 25 Wend. (N. Y.) 619; *Hesketh v. Gowing*, 5 Esp. 131. But not, it seems, where the woman was married to another at the time the child was begotten. *Vetten v. Wallace*, 39 Ill. App. 390. An agreement by a man to pay for the maintenance of children which may result from future illicit cohabitation is void, because of its immoral tendency. *Clark*, Cont. 439; *Crook v. Hill*, 3 Ch. Div. 773. But such an agreement as to children already born, or as to a child in ventre sa mere, is valid; the illicit intercourse in such case being past. *Clark*, Cont. 439; *Crook v. Hill*, *supra*.

⁶⁸ *Wright v. Wright*, 2 Mass. 109; *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. 257, 259; *Nine v. Starr*, 8 Or. 49; *Carpenter v. Whitman*, 15 Johns. (N. Y.) 208; *People v. Landt*, 2 Johns. (N. Y.) 375; *Com. v. Fee*, 6 Serg. & R. (Pa.) 255; *Town of Hudson v. Hills*, 8 N. H. 417.

pulsory remedy, generally known as "bastardy proceedings," to compel the father to support the child.⁶⁹

⁶⁹ 18 Eliz. c. 3; 4 & 5 Wm. IV. c. 76, § 72; *Mann v. People*, 35 Ill. 467; *Maloney v. People*, 38 Ill. 62; *State v. Evans*, 19 Ind. 92; *Scantland v. Com.*, 6 J. J. Marsh. (Ky.) 585; *Balley v. Chesley*, 10 Cush. (Mass.) 284; *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *People v. Harty*, 49 Mich. 490, 13 N. W. 829; *State v. Nichols*, 29 Minn. 357, 13 N. W. 153; *State v. Mushied*, 12 Wis. 561; *Van Tassel v. State*, 59 Wis. 351, 18 N. W. 328. There is a valuable note on this subject covering, also, the procedure, evidence, etc., under the statutes, in 56 Am. Dec. 210-223.

CHAPTER IX.

DUTIES AND LIABILITIES OF PARENTS.

- 114-115. Parent's Duty to Maintain Child.
- 116. Maintenance in Equity—Allowance Out of Child's Estate.
- 117. Parent's Duty to Protect Child.
- 118. Parent's Duty to Educate Child.
- 119. Contracts by Child as Parent's Agent.
- 120. Parent's Liability for Child's Torts.
- 121. Parent's Liability for Child's Crimes.

PARENT'S DUTY TO MAINTAIN CHILD.

- 114. In England, and in some of our states, by statute, it is made the duty of the parent to maintain his child. In some states it is made a penal offense if he neglects to do so.
- 115. Whether there is a legal duty on the part of the parent, at common law, to maintain his minor child, so as to render him liable for necessities furnished the child, is a question upon which the authorities are conflicting.
 - (a) In England, and in some of our states, it is held that there is only a moral obligation, in the absence of a statute, and that there is no liability for necessities unless there is a promise in fact to pay for them, express or implied.
 - (b) In other states it is held that the obligation is a legal one, and that there is a liability for necessities, in case of nonsupport by the parent, in the absence of any promise in fact, or else that, if the obligation is merely a moral one, it is nevertheless sufficient to create such a liability.

Morally, of course, a parent is bound to support his children, if they are unable to support themselves. In most jurisdictions this moral obligation is expressly made a legal obligation by statute. It

is provided by the statute of 43 Eliz. c. 2, that the father and mother, grandfather and grandmother, of poor, old, blind, lame, and impotent persons, shall maintain them, if of sufficient ability, but that no person is bound to provide for his children unless they are impotent, or unable to work, through infancy, disease, or accident, and then that he is only obliged to furnish them with necessaries. Statutes more or less similar to this, and having the same object, have been enacted in many of our states. Even where this is not the case, it would seem that the English statute is to be regarded as in force, for it is old enough to have become a part of our common law, and is applicable to our conditions. In most states, by statute, it is made a penal offense for a parent to abandon his minor children, or neglect to support them.

Whether or not, at common law and independently of statutory provision, a parent is under a legal obligation to support and maintain his children, or whether it is merely a natural duty, binding in morals only, is a question upon which the authorities are conflicting. The later English cases hold that there is only a moral obligation. "Except under the operation of the poor law," said Cockburn, J., "there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation."¹ It is accordingly held in England that a parent, even where he neglects to support his child, is not liable for necessities furnished to it, in the absence of an express promise to pay for them, or conduct from which a promise may be implied as a matter of fact. In other words, it is held that the law does not, as in the case of husband and wife, create any liability on the part of a parent for necessities furnished his child, in the absence of contract in fact, express or implied, on his part. "It is a clear principle of law," said Parke, B., "that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceeding under 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability."²

¹ *Bazeley v. Forder*, L. R. 3 Q. B. 559.

² *Mortimore v. Wright*, 6 Mees. & W. 482. And see *Shelton v. Springett*, 11 C. B. 452, where it is said that "a father is not liable on a contract made

In this country the rule is the same in many states. In a number of states it has been expressly held, in accordance with the English cases referred to, that a parent is under no legal obligation to support his children;³ and that he is not liable, therefore, for necessities furnished to them, in the absence of an express contract to pay for them, or a contract implied in fact.⁴

The result of these decisions is startling, and is clearly opposed to every natural sense of justice. If they are sound, the result is that a father can desert a child which, because of its youth or of sickness or other cause, is absolutely helpless, and a stranger who, to save its life, feeds and clothes it, and procures necessary medical attendance, cannot recover his expenditures from the father. On the other hand, if a husband deserts his wife, though she may be fully able to work and to earn a living, the law allows her to bind her husband for necessities furnished her, even against his express command not to furnish them.⁵ Again, it is well settled, both in England and in this country, that a parent who, being able, neglects to provide the necessities of life, including necessary medical attendance, for a child who is unable to provide for himself, and thereby causes the child's death, is guilty of manslaughter at least; and, if the neglect is willful and malicious, he is guilty of murder.⁶ It is equally well settled, as a general principle of law, that to render a person guilty of manslaughter, because of a neglect of duty causing another's death, the duty must be a legal, as distinguished from a merely moral, duty.⁷ It is

by his minor child, even for necessities furnished, unless an actual authority be proved or the circumstances be sufficient to imply one." And it is also said that the mere obligation to provide for the child's maintenance affords no legal inference for a promise.

³ *Kelley v. Davis*, 49 N. H. 187 (but see *Hillsborough v. Deering*, 4 N. H. 86; *Pidgin v. Cram*, 8 N. H. 352); *Gordon v. Potter*, 17 Vt. 348; *Freeman v. Robinson*, 38 N. J. Law, 383; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Chilcott v. Trimble*, 13 Barb. (N. Y.) 502; *Hunt v. Thompson*, 3 Scam. (Ill.) 179; *McMillen v. Lee*, 78 Ill. 443 (but see cases cited in note 8, *infra*); *Hollingsworth v. Swedenborg*, 49 Ind. 378; *Holt v. Baldwin*, 46 Mo. 265; *White v. Mann*, 110 Ind. 74, 10 N. E. 629.

⁴ See the cases cited above.

⁵ *Ante*, p. 118.

⁶ *Clark, Cr. Law*, 177, and cases there cited; *Reg. v. Morby*, *Clark, Cr. Cas.* 75.

⁷ *Clark, Cr. Law*, 177, 178, and cases there cited.

inconsistent, therefore, to hold a parent criminally liable for neglect to support his child, and at the same time to say that he is under no legal obligation to support it. The law says that a parent is criminally liable for neglect causing his child's death; and it says that a stranger who sees a child starving on the common, or attacked by a dog, or drowning, is not criminally liable for not rescuing it, because the stranger is not legally, but only morally, bound to interfere. And yet the law also says that a parent is not under a legal, but only under a moral, obligation to feed his starving child.

These inconsistencies in the decisions show that some of them are wrong. The truth is that, in reason and on principle, a parent is legally, as well as morally, bound to support his children, if they are unable to care for themselves, and if he is able to do so; and if he neglects to do so, and another performs the duty for him, even against his wish or directions, he may recover therefor from the father, without regard to any idea of a contract in fact. There are a number of cases, and much dictum, in favor of this view.* If this is not the prevailing view, it ought to be. Some of the cases cited in

* 2 Kent, Comm. 190; Reeve, Dom. Rel. 283; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480; Edwards v. Davis, 16 Johns. (N. Y.) 285; In re Ryder, 11 Paige (N. Y.) 188; Furman v. Van Sise, 56 N. Y. 435; Manning v. Wells, 8 Misc. Rep. 646, 29 N. Y. Supp. 1044; Plaster v. Plaster, 47 Ill. 290; Allen v. Jacobi, 14 Ill. App. 277; Miller v. McKinney, 45 Ill. App. 447 (but see Hunt v. Thompson, 3 Scam. [Ill.] 179; McMillen v. Lee, 78 Ill. 443); Owen v. White, 5 Port. (Ala.) 435; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471; Keaton v. Davis, 18 Ga. 457; Reynolds v. Sweetser, 15 Gray (Mass.) 78; Dennis v. Clark, 2 Cush. (Mass.) 347, 352; Weeks v. Merrow, 40 Me. 151; Hillsborough v. Deering, 4 N. H. 86; Pidgin v. Cram, 8 N. H. 352 (but see Kelley v. Davis, 49 N. H. 187); Fitler v. Fitler, 33 Pa. St. 50; Holtzman v. Castleman, 2 MacArthur (D. C.) 555; Maguinay v. Saudek, 5 Sneed. (Tenn.) 147; Porter v. Powell, 79 Iowa, 151, 44 N. W. 295; Stanton v. Willson, 3 Day (Conn.) 37 (approved in Finch v. Finch, 22 Conn. 421); Evans v. Pearce, 15 Grat. (Va.) 513. See, also, Conn v. Conn, 57 Ind. 323; Courtright v. Courtright, 40 Mich. 633; Buckminster v. Buckminster, 38 Vt. 252; Holt v. Holt, 42 Ark. 495. Though, as we have seen, the later English cases are opposed to this view, it is not altogether clear that they are sustainable by authority. See Rawlyns v. Vandyke, 3 Esp. 252; Stone v. Carr, Id. 1. A father is not liable for necessities furnished a child while in the custody of the mother, who had left him without cause. Hyde v. Leisenring (Mich.) 65 N. W. 536, and cases there cited. Nor is he liable if the child is of the age of discretion, and has left home without cause. Id.

support of the above proposition seem to recognize, what is held in England, that there is only a moral obligation on the part of the parent to furnish support, but that this moral obligation is sufficient to impose the legal liability for necessities upon the parent; but it is not proper to put the decision on this ground, for the general rule is that a moral obligation will not even support an express promise. To hold the parent liable, the courts, in effect, hold that the obligation is a legal one.

There is also a conflict of authority on the question of the duty of a mother, who is a widow, to maintain her minor children. In some states it has been held that she is liable.⁹ In others the contrary is held.¹⁰ In case a widow marries again, the stepfather is under no obligation to support her children by her first husband.¹¹

It has been held that the husband's duty of maintenance does not pass to the wife on divorce;¹² but, when the care and custody of the children are awarded to the mother by the decree, this ought to be considered as carrying with it the obligation to support; and so it has been held.¹³ The obligation of the mother ought not to be considered as exclusive of her husband's liability. He should remain liable to her for her maintenance of the child. And it has been held that such is the law. The duty to support his children, said the Ohio court, "is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of

⁹ *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344; *Finch v. Finch*, 22 Conn. 411; *Furman v. Van Sise*, 56 N. Y. 435; *Gray v. Durland*, 50 Barb. (N. Y.) 100, and dissenting opinion, page 211.

¹⁰ *Englehardt v. Yung*, 76 Ala. 534; *Mowbry v. Mowbry*, 64 Ill. 383; *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97 (but see *Inhabitants of Dedham v. Inhabitants of Natick*, 16 Mass. 135); *In re Besondy*, 32 Minn. 385, 20 N. W. 366.

¹¹ *Tubb v. Harrison*, 4 Term R. 118; *Com. v. Hamilton*, 6 Mass. 273; *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *Bond v. Lockwood*, 33 Ill. 212; *McMahill v. McMahon*, 113 Ill. 461. But see *Ela v. Brand*, 63 N. H. 14.

¹² *Courtright v. Courtright*, 40 Mich. 633; *Thomas v. Thomas*, 41 Wis. 229; *Conn v. Conn*, 57 Ind. 323.

¹³ *Burritt v. Burritt*, 29 Barb. (N. Y.) 124; *Brow v. Brightman*, 136 Mass. 187; *Finch v. Finch*, 22 Conn. 411.

the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability. The divorce may deprive him of the custody and the services of his children, and of the rights of guardianship, against his will; but if, by the judgment of the court, and upon competent and sufficient evidence, he is found to be an unfit person to exercise parental control, while the mother is in all respects the proper person to be clothed with such authority, he cannot justly complain. The alimony allowed by the court below is not to be construed into an allowance for the support also of the child. 'Alimony,' in its proper significance, is not maintenance to the children, but to the wife; and the fact that there has been a judgment of divorce, with alimony and custody of minor children to the wife, will not of itself operate as a bar to a subsequent claim against the husband for the children's maintenance."¹⁴

The obligation on the part of the parent to maintain the child continues until the child is in a condition to provide for its own maintenance, and no further; and in no case does it extend further than to a necessary support.¹⁵ The legal obligation ceases, except under some of the statutes, as soon as the child reaches the age of majority, however helpless he may be, and however wealthy the father may be.¹⁶

MAINTENANCE IN EQUITY—ALLOWANCE OUT OF CHILD'S ESTATE.

116. When a parent is unable to support his child, and the child has property, equity will make allowances therefrom for his future or past maintenance. An allowance will not be granted if the parent is able to support his child, except where the child's fortune exceeds the parent's, when it may be maintained according to its fortune.

¹⁴ Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471. And see Holt v. Holt, 42 Ark. 495.

¹⁵ 2 Kent, Comm. 190.

¹⁶ 2 Kent, Comm. 191.

Where a father has not sufficient means to support his child, and the child has property of its own, it may be not only maintained, but educated, from the income of such property; and a court of equity will order such allowances as may be necessary.¹⁷ In an urgent case the court may use the principal of a fund or other property belonging to a child to maintain and educate him.¹⁸ As a general rule, however, if the father is amply able to support and educate his child, no allowance will be made out of the child's property, unless the child's fortune is in excess of that of the parent.¹⁹

It is obviously to the best interests of the child that he be maintained and educated in such a manner as to fit it to fill the position in life to which its future will entitle it. And it has therefore been held that, when the child's fortune warrants a scale of expenditure beyond what the parent's fortune will permit, a court of equity will make allowances therefrom, in accordance with the fortune, for his maintenance and education.²⁰ "What allowance, if any, shall be made to a father out of his children's property, for their maintenance, is a broad question of equity. The circumstances of each case, including the respective estates of father and child, are considered, and the decision is a just and reasonable conclusion of fact, with due regard for the general rule of parental duty."²¹

An allowance may also be made for past maintenance and education, when the extent of the respective estates of the parent and child, and the particulars of the expenditures, render an allowance

¹⁷ 2 Kent, Comm. 191; 3 Pom. Eq. Jur. § 1309, note 4; Fuller v. Fuller, 23 Fla. 236, 2 South. 426; Beardsley v. Hotchkiss, 96 N. Y. 201, 219; Newport v. Cook, 2 Ashm. (Pa.) 332; Evans v. Pearce, 15 Grat. (Va.) 513.

¹⁸ Newport v. Cook, *supra*.

¹⁹ Butler v. Butler, 3 Atk. 58; Darley v. Darley, Id. 399; Wellesley v. Duke of Beaufort, 2 Russ. 3, 28; Cruger v. Heyward, 2 Desaus. Eq. (S. C.) 94; In re Kane, 2 Barb. Ch. (N. Y.) 375; Chapline v. Moore, 7 T. B. Mon. (Ky.) 150; Tanner v. Skinner, 11 Bush (Ky.) 120; In re Harland, 5 Rawle (Pa.) 323; Ela v. Brand, 63 N. H. 14; Buckley's Adm'r v. Howard, 35 Tex. 566; Kinsey v. State, 98 Ind. 351; Hines v. Mullins, 25 Ga. 696; Burke v. Turner, 85 N. C. 500.

²⁰ 2 Kent, Comm. 191; Jervoise v. Silk, Coop. t. Eld. 52; Roach v. Garvan, 1 Ves. Sr. 157; In re Burke, 4 Sandf. Ch. (N. Y.) 617; Trimble v. Dodd, 2 Tenn. Ch. 500; Ela v. Brand, 63 N. H. 14; Evans v. Pearce, 15 Grat. (Va.) 513. But see McKnight's Ex'rs v. Walsh, 23 N. J. Eq. 139.

²¹ Ela v. Brand, *supra*.

equitable and just.²² The mother is shown special favor in allowances for past maintenance and expenditures for education, and the courts will grant them in her case without so strict a showing as might be required of the father.²³

PARENT'S DUTY TO PROTECT CHILD.

117. The law recognizes the duty of a parent to protect his child, and will uphold him therein.

The duty of a parent to protect his child is fully recognized by the common law; but, as was said by Blackstone, it is "rather permitted than enjoined by any municipal law; nature in this respect working so strongly as to need rather a check than a spur."²⁴ A parent may justify an assault and battery, or even a homicide, in the necessary defense of the person of his child.²⁵ And he could maintain and uphold his children in their lawsuits without being guilty of the common-law offense of maintenance.²⁶

²² *Brown v. Smith*, 10 Ch. Div. 377; *In re Kane*, 2 Barb. Ch. (N. Y.) 375; *Smith v. Geortner*, 40 How. Prac. (N. Y.) 185; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Otte v. Becton*, 55 Mo. 99; *Myers v. Myers*, 2 McCord, Eq. (S. C.) 214; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. 655.

²³ *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *Stewart v. Lewis*, 16 Ala. 734; *Englehardt v. Yung*, 76 Ala. 534; *Mowbry v. Mowbry*, 64 Ill. 383; *Gladding v. Follett*, 2 Dem. Sur. (N. Y.) 58; *Whipple v. Dow*, 2 Mass. 415; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048; *Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. 655.

²⁴ 1 Bl. Comm. 450.

²⁵ 1 Bl. Comm. 450; 1 Hawk. P. C. 131.

²⁶ 1 Bl. Comm. 450. But it is not the legal duty of a parent to engage counsel to defend his child. *Hill v. Childress*, 10 Yerg. (Tenn.) 514.

PARENT'S DUTY TO EDUCATE CHILD.**118. Parents are not under any legal duty to educate their children.**

It is sometimes said by text writers that it is the duty of a parent to give his children an education suitable to their station in life,²⁷ and there are dicta in many cases to the same effect.²⁸ This duty, however, is only a moral one. There is no legal duty on the part of a parent to educate his children, however wealthy he may be. At least, there seems to be no case in which such a duty has been enforced, either directly or indirectly. Education is not necessary to the subsistence of a child, and the reasons which should, and in some states do, render a parent legally bound to support his child do not apply.

CONTRACTS BY CHILD AS PARENT'S AGENT.**119. A child, if expressly or impliedly authorized, may act as his parent's agent, and bind him by a purchase of goods, or by any other contract. If the parent holds the child out as having authority, he constitutes him his agent by estoppel.**

If a child is authorized, he may act as agent for his parent. Not only may he bind his parent to pay for necessities purchased, when authorized by him; but he may, when authorized, bind him by any other contract. This depends, not upon any principle peculiar to the relation of parent and child, but on principles of the law of agency. The relation, however, will enable the court to infer authority from slight evidence.²⁹ It will be implied if the parent has been in the habit of paying his child's bills without objection.³⁰ "Where the father permits his minor child to purchase goods on his

²⁷ 1 Bl. Comm. 150; 2 Kent, Comm. 189.

²⁸ *Morse v. Welton*, 6 Conn. 547; *Abbott v. Converse*, 4 Allen (Mass.) 533; *Lord v. Poor*, 23 Me. 569; *Johnson v. Terry*, 34 Conn. 259.

²⁹ *Freeman v. Robinson*, 38 N. J. Law, 383; *Jordan v. Wright*, 45 Ark. 237.

³⁰ *Thayer v. White*, 12 Metc. (Mass.) 343; *Fowlkes v. Baker*, 29 Tex. 135; *Bryan v. Jackson*, 4 Conn. 288; *Murphy v. Ottenheimer*, 84 Ill. 39; *Johnson*

account, whether for himself or for the father, and he pays for them without objection, it is a reasonable presumption that the minor had authority, and was the agent of the father, having full power to make such purchases. The proof of such authority is the same as the agency of the wife or a servant. The circumstances which authorize the inference of authority in the one case will be sufficient in either of the others; in each the question being whether there was authority to act as agent. When the agency is found to exist, the law then implies a promise, as in the case of any other agency."³¹ The father who allows his child to purchase goods on his credit, and pays the bills without objection, cannot be heard to deny the child's agency. There is a clear case of agency by estoppel, for the father thus holds out the child as having authority to bind him.

If the credit is given to the child in these cases, and not to the parent, the latter does not become liable, for his liability is based on the theory that the child has contracted, not for himself, but as agent for his parent; that he has pledged his parent's, and not his own, credit.

PARENT'S LIABILITY FOR CHILD'S TORTS.

120. A parent is not liable, because of the relation, for the torts of his child; but he may be liable for torts committed as his agent or servant, or with his knowledge and acquiescence.

Unlike the status of husband and wife, where the law makes the husband liable for his wife's torts,³² the status of parent and child imposes no liability on the parent for the torts of his child not committed with his knowledge, nor by his authority, express or implied.³³

v. Smallwood, 88 Ill. 73; *Manning v. Wells*, 8 Misc. Rep. 646, 29 N. Y. Supp. 1044.

³¹ *Murphy v. Ottenheimer*, *supra*. A child cannot bind the parent even for necessities unless authorized by the parent, expressly or by conduct, or unless the parent neglects to support him. *Miller v. Davis*, 49 Ill. App. 377; *Reynolds v. Ferree*, 86 Ill. 570; and cases above cited.

³² *Ante*, p. 59.

³³ *Moon v. Towers*, 8 C. B. (N. S.) 611; *Tift v. Tift*, 4 Denio (N. Y.) 175;

There was such a liability under the civil law, but it never was recognized by the common law. If the parent authorizes the child to act as his servant or agent in any matter, he will be liable for any torts committed by the child in the course of this employment.³⁴ This liability does not depend upon the relationship of the parties as parent and child, but upon their relationship as principal and agent, and is governed by the rules governing other cases of agency. "A father is never liable for the wrongful acts of his minor son, unless the acts are committed with the father's consent, or in connection with the father's business."³⁵ The nature of the tort, and the character of the child, can make no difference. A father, for instance, is not liable for an unauthorized assault by his son, though he may have known that the son was of a vicious character.³⁶ If a father knows that his minor child is committing a tort, and makes no effort to restrain him, he will be deemed to have consented and authorized its commission.³⁷

Paulin v. Howser, 63 Ill. 312; *Wilson v. Garrard*, 59 Ill. 51; *Schlossberg v. Lahr*, 60 How. Prac. (N. Y.) 450; *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 199; *Baker v. Haldeman*, 24 Mo. 219; *Paul v. Hummel*, 43 Mo. 119; *Chandler v. Deaton*, 37 Tex. 406; *Edwards v. Crume*, 13 Kan. 348; *Smith v. Davenport*, 45 Kan. 423, 25 Pac. 851; *McCalla v. Wood*, 2 N. J. Law, 81; *Scott v. Watson*, 46 Me. 362; *Shockley v. Shepherd*, 9 Houst. (Del.) 270, 32 Atl. 173

³⁴ *Teagarden v. McLaughlin*, 86 Ind. 476; *Strohl v. Levan*, 39 Pa. St. 177; *Lashbrook v. Patten*, 1 Duv. (Ky.) 317; *Beedy v. Reding*, 16 Me. 362; *Dunks v. Grey*, 3 Fed. 862. In *Strohl v. Levan*, *supra*, a father was held liable in trespass for an injury inflicted by his son while driving the father's team the father being present in the wagon at the time.

³⁵ *Smith v. Davenport*, *supra*. In *Tift v. Tift*, *supra*, an action was brought against a man for the killing of a hog by a dog, on the ground that the dog was set on by the defendant's minor daughter. In *Baker v. Haldeman*, and other cases, *supra*, the father was sued for an assault committed by his child. In neither case was the tort committed with the father's consent, and he was held not liable. On the other hand, in *Teagarden v. McLaughlin*, *supra*, where a minor son had contracted with his father to clear a parcel of land, and in doing so negligently burned the property of a third person, the father was held liable, not because he was the parent of the wrongdoer, but because the wrongdoer was acting in his employment.

³⁶ *Paul v. Hummel*, *supra*.

³⁷ In *Beedy v. Reding*, 16 Me. 362, a father was held liable in trover for wood taken at three different times by his minor sons, under circumstances which justified the jury in finding that it was taken with the father's knowl-

The liability of a child for his own torts will be shown when we come to deal with the disability of infancy.³⁸

PARENT'S LIABILITY FOR CHILD'S CRIMES.

121. The relation of parent and child does not render the parent liable for his child's crimes.

A parent may become criminally liable for the acts of his son if he counsels, aids, or abets him therein, just as he would become liable as an aider and abettor of any other criminal. But he does not incur any criminal liability for acts of his child to which he is in no way a party. The child's liability for his own crimes is hereafter shown.³⁹

edge. "The minor sons of the defendant," said the court, "being at the time members of his family, with the defendant's team, at three several times, hauled away the plaintiff's wood. This could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. 'Qui non prohibet cum prohibere possit, jubet.' And this maxim may be applied with great propriety to minor children residing with and under the control of their father." See, also, *Dunks v. Grey*, 3 Fed. 802.

³⁸ Post, p. 406.

³⁹ Post, p. 401.

CHAPTER X.

RIGHTS OF PARENTS AND OF CHILDREN.

- 122. Rights of Parents in General.
- 123. Parent's Right to Correct Child.
- 124-125. Custody of Children.
- 126. Parent's Right to Child's Services and Earnings.
- 127-130. Emancipation of Children.
- 131-133. Action by Parent for Injuries to Child.
- 134-136. Action by Parent for Seduction or Debauching of Daughter.
- 137-138. Action by Parent for Abducting, Enticing, or Harboring Child.
- 139. Parent's Rights in Child's Property.
- 140. Gifts, Conveyances, and Contracts between Parent and Child.
- 141-142. Advancements.
- 143. Duty of Child to Support Parent.
- 144. Domicile of Child.

IN GENERAL.

122. To enable them to perform their duties, parents have, subject to certain restrictions—
- (a) The right to correct their children.
 - (b) The right to their custody.
 - (c) The right to their services and earnings.

Parents possess certain powers over their children, and certain rights in relation to them. As will be seen in the following pages, they have the right to control and correct them within certain limits, the right to the custody of them, and the right to their services. Blackstone says that these rights are given to parents, partly to enable them to more effectively perform their duty, and partly as a recompense for their care and trouble in discharging it.¹ Kent says: "The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority, and, in the support of that authority, a right

¹ 1 Bl. Comm. 452.

to the exercise of such discipline as may be requisite for the discharge of their sacred trust. This is the true foundation of parental power." ²

PARENT'S RIGHT TO CORRECT CHILD.

123. A parent, or one standing in loco parentis, may correct the child in a reasonable manner. If the correction is excessive or without cause, he will be amenable to the criminal law.

A parent has the right to correct and punish his minor child in a reasonable manner; and, so long as he keeps within the bounds of moderation, he cannot be made amenable to the criminal law therefor, as he would be if he undertook to punish another's child.³ Persons standing in loco parentis have the same right.⁴ A school teacher is within the rule.⁵ In the decided cases, the question has generally arisen in regard to the father; but there is no reason why the power of correction should not, like the power of control and the right to the child's services, pass to the mother on the father's death. Indeed, there seems no reason to doubt but that, even during the father's lifetime, except against his objection, the mother has a legal right to correct her children.

A parent cannot exercise the right of correction in a cruel manner, as by inflicting excessive punishment.⁶ Nor can he inflict punishment wantonly and without cause.⁷ If he transcends his authority in

² 2 Kent, Comm. 203.

³ 1 Hawk. P. C. 130; 1 Bl. Comm. 452; Clark, Cr. Law, 212; Winterburn v. Brooks, 2 Car. & K. 16.

⁴ Gorman v. State, 42 Tex. 221; State v. Alford, 68 N. C. 322; Boyd v. State, 88 Ala. 169, 7 South. 268; Dean v. State, 89 Ala. 46, 8 South. 38.

⁵ Anderson v. State, 3 Head (Tenn.) 455; Lander v. Seaver, 32 Vt. 114; State v. Burton, 45 Wis. 150; Danenhoffer v. State, 69 Ind. 295; Patterson v. Nutter, 78 Me. 509, 7 Atl. 273.

⁶ Reg. v. Griffin, 11 Cox, Cr. Cas. 402; Johnson v. State, 2 Humph. (Tenn.) 283; Com. v. Coffey, 121 Mass. 66; Com. v. Blaker, 1 Brewst. (Pa.) 311; Neal v. State, 54 Ga. 281; State v. Bitman, 13 Iowa, 485; State v. Jones, 95 N. C. 588; Com. v. Seed, 5 Clark (Pa.) 78; Dean v. State, 89 Ala. 46, 8 South. 38.

⁷ Fletcher v. People, 52 Ill. 395; Com. v. Coffey, 121 Mass. 66; Gorman v. State, 42 Tex. 221; State v. Jones, 95 N. C. 588; Hinkle v. State, 127 Ind.

this respect, he will be amenable to the criminal law. He will be guilty of assault and battery,⁸ or murder or manslaughter,⁹ according to the circumstances. "The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time that the law has created and preserved this right, in its regard for the safety of the child, it has prescribed bounds beyond which it shall not be carried. In chastising a child, the parent must be careful that he does not exceed the bounds of moderation, and inflict cruel and merciless punishment. If he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess, which constitutes the offense; and what this excess shall be is not a conclusion of law, but a question of fact, for the determination of the jury."¹⁰

Some of the authorities hold a parent, or one standing in loco parentis, criminally liable if, in correcting the child, he acts unreasonably,—that is, if the correction is immoderate or excessive in fact,—even though he may have acted honestly and without malice, and though no permanent injury may have been inflicted on the child; and they leave it to the jury exclusively to determine whether the correction was immoderate, without any further test than that of its being reasonable.¹¹ According to the better opinion, however, the jury are not

490, 26 N. E. 777. It is held that, where the relation of parent and child exists, the child cannot maintain an action for damages against the parent for personal injuries wrongfully inflicted. "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families, and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." *Hewlett v. George*, 68 Miss. 703, 9 South. 885.

⁸ Clark, Cr. Law, 212.

⁹ Clark, Cr. Law, 158, 172.

¹⁰ *Johnson v. State*, 2 Humph. (Tenn.) 283.

¹¹ *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273; *Johnson v. State*, 2 Humph.

to be permitted to determine in all cases, without regard to any fixed rule or standard, whether the correction was, in their opinion, unreasonable, and therefore excessive. Parents must be allowed to exercise some discretion. A jury cannot exercise it for them. The court should therefore instruct the jury that they are not justified in finding that the parent is criminally liable because he exceeded his authority, unless they find that he inflicted permanent injury, or that he acted from malice.¹² As was said by the North Carolina court: "It would be a dangerous innovation, fruitful in mischief, if, in disregard of an established rule assigning limits to parental power, it were to be left to the jury to determine in each case whether a chastisement was excessive and cruel, and to convict when such was their opinion."¹³ "The law has provided no means whereby a parent, meditating chastisement, can first obtain a judicial opinion as to its necessity, the proper instruments, and its due extent. In reason, therefore, if he acts in good faith, prompted by true parental love, without passion, and inflicts no permanent injury on the child, he should not be punished merely because a jury, reviewing the case, do not deem that it was wise to proceed so far."¹⁴ Malice on the part of the parent may, of course, be inferred from the circumstances, the fault for which the punishment was inflicted, the instrument used, etc.¹⁵ Thus, malice may well be inferred where a father strikes

(Tenn.) 283; *Hinkle v. State*, 127 Ind. 490, 26 N. E. 777; *Neal v. State*, 54 Ga. 281.

¹² *State v. Jones*, 95 N. C. 588; *State v. Alford*, 68 N. C. 322; *State v. Pendergrass*, 2 Dev. & B. (N. C.) 365; *Com. v. Seed*, 5 Clark (Pa.) 78; *Boyd v. State*, 88 Ala. 169, 7 South. 268; *Dean v. State*, 89 Ala. 46, 8 South. 38.

¹³ *State v. Jones*, *supra*.

¹⁴ 1 Bish. Cr. Law, § 882. "There are some well-considered authorities which hold teachers and parents alike liable, criminally, if, in the infliction of chastisement, they act clearly without the exercise of reasonable judgment and discretion. The test which seems to be fixed by these cases is the general judgment of reasonable men. *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273. The more correct view, however, and the one better sustained by authority, seems to be that when, in the judgment of reasonable men, the punishment inflicted is immoderate and excessive, and a jury would be authorized, from the facts of the case, to infer that it was induced by legal malice, or wickedness of motive, the limit of lawful authority may be adjudged to be passed." *Boyd v. State*, *supra*.

¹⁵ *Boyd v. State*, *supra*.

his ten year old daughter with a saw; ¹⁶ or leaves his twelve year old daughter in the house alone, tied to a piece of furniture; ¹⁷ or keeps his blind son shut up for several days in winter, in a cold, damp cellar; ¹⁸ or strikes his son several times in the face with his fist, and with the butt end of a stick, and uses language showing passion. ¹⁹

In all cases the legal presumption is that the correction was proper, and the burden of proof is on him who contends that it was otherwise. ²⁰

CUSTODY OF CHILDREN.

124. At common law, in England, the father, and on his death the mother, was entitled, as a matter of course, to the custody and control of their minor children, except in case of their gross unfitness. Equity, however, would not allow the right to control as against the well-being of the child. The common-law doctrine has also been modified by statute in England.

125. In this country the courts recognize the parental right of custody in the different jurisdictions, but the prevailing doctrine is that, in awarding the custody of a child, the welfare of the child is the controlling consideration. The courts consider, not only the fitness of the persons contending for the custody, but the condition and future prospects of the child, and the wishes of the child where it is old enough to decide intelligently.

At common law the father is entitled to the custody of his minor child. Some cases recognize this as an absolute right, except in the case of the most flagrant unfitness, and have awarded the father the

¹⁶ Neal v. State, 54 Ga. 281.

¹⁷ Hinkle v. State, 127 Ind. 490, 26 N. E. 777.

¹⁸ Fletcher v. People, 52 Ill. 395.

¹⁹ Boyd v. State, *supra*.

²⁰ See Anderson v. State, 3 Head (Tenn.) 455.

custody of his child, without taking the interests of the child into consideration at all.²¹ The right has been upheld even to the extent of allowing the father to take an infant from its mother's breast.²² After the death of the father, the right to the custody of the children passes to the mother.²³

The common-law rule of the husband's paramount right to the custody of his children was modified in England by an act passed in 1839, known as "Talfourd's Act," conferring authority on the court of chancery to award to the mother the custody of children under the age of seven,²⁴ and again by the "Infant's Custody Act," of 1873, conferring such authority as to children under sixteen.²⁵ Long prior to these acts, the court of chancery in England had departed from the strict rule of the common law, and had refused to recognize any right in the father to demand the custody of his child, regardless of the child's interests, and had interfered to protect the welfare of the child;²⁶ and the rule there is now well settled that a court exercising chancery jurisdiction will primarily consider the welfare of the child.²⁷

Generally, in this country, the courts of law, as well as those of equity, while acknowledging the general rule that the father, and on his death the mother, is entitled to the child's custody, modify the rule to a greater or less extent by adopting the equitable principle that this right must yield to considerations affecting the well-being of the child.²⁸ There is some conflict in the cases; but the great weight of authority establishes the following propositions:

²¹ *Ex parte Hopkins*, 3 P. Wms. 152; *Rex v. De Manneville*, 5 East, 221; *Rex v. Greenhill*, 4 Adol. & E. 624; *In re Andrews*, L. R. 8 Q. B. 153; *People v. Olmstead*, 27 Barb. (N. Y.) 9.

²² *Rex v. De Manneville*, *supra*.

²³ *Villareal v. Mellish*, 2 Swanst. 536; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Cook v. Bybee*, 24 Tex. 278.

²⁴ 2 & 3 Vict. c. 54.

²⁵ 36 & 37 Vict. c. 12.

²⁶ 2 Story, Eq. Jur. § 1341; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Wellesley v. Wellesley*, 2 Bligh (N. S.) 141.

²⁷ *Reg. v. Gyngall* [1893] 2 Q. B. 232.

²⁸ *Dumain v. Gwynne*, 10 Allen (Mass.) 270; *In re Smith*, 13 Ill. 138; *Cowls v. Cowls*, 3 Gilm. (Ill.) 435; *State v. Baird*, 21 N. J. Eq. 384; *State v. Flint* (Minn.) 65 N. W. 272; *Schroeder v. State*, 41 Neb. 745, 60 N. W. 89;

(1) Though the courts have a discretion in contentions over the custody of children, and will take into consideration the welfare of the child, they cannot act arbitrarily, and disregard the rights of the father, merely because the prospects and surroundings of the child will be brighter if he is awarded to some other and more wealthy person. The right of the father is generally held to be a paramount right, if he is a fit person.²⁹ It would be absurd to say that if a father is poor, and occupies a humble station in life, he may be deprived of the custody of his children, because a more wealthy and refined person is willing to take them, and can give them better advantages. As was said by the Arkansas court: "It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone."³⁰ While the welfare of the child is always to be considered, due weight must always be given to the legal rights of the father. "The discretion to be exercised is not an arbitrary one, but, in the absence of any positive disqualification of the father for the proper discharge of his parental duties, he has, as it seems to us, a paramount right to the custody of his infant child, which no court is at liberty to disregard. And, while we are bound also to regard the permanent interests and welfare of the child, it is to be presumed that its interests and welfare will be best promoted by continuing that guardianship which the law has provided, until it is made plainly to appear that the father is no longer worthy of the trust."³¹

Slater v. Slater, 90 Va. 845, 20 S. E. 780; *Corrie v. Corrie*, 42 Mich. 509, 4 N. W. 213; *Rowe v. Rowe*, 28 Mich. 353; *In re Heather Children*, 50 Mich. 261, 15 N. W. 487, and cases hereafter cited.

²⁹ *Verser v. Ford*, 37 Ark. 27; *State v. Richardson*, 40 N. H. 272; *Rust v. Vanvacter*, 9 W. Va. 600; *Henson v. Walts*, 40 Ind. 170; *Draper v. Draper*, 68 Ill. 17; *State v. Barney*, 14 R. I. 62; *Johnson v. Terry*, 34 Conn. 259; *People v. Olmstead*, 27 Barb. (N. Y.) 1; *Lovell v. House of Good Shepherd*, 9 Wash. 419, 37 Pac. 660; *Brinster v. Compton*, 68 Ala. 299; *Slater v. Slater*, 90 Va. 845, 20 S. E. 780; *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012.

³⁰ *Verser v. Ford*, *supra*.

³¹ *State v. Richardson*, *supra*.

(2) The best interests of the child are always to be considered, having due regard to the parental rights of the father. Few cases can be found in which a child has been taken from a father, who was able and willing to support it, and who had been guilty of no breach of duty towards it, and given to a stranger or to a more distant relative. An examination of the cases will show that where the supposed interests of the child have been allowed to control as against the right of the father, the father has been guilty of some breach of his duty to the child. If a father, or one standing in loco parentis, is a drunkard, or a criminal, or cruel,³² or shiftless, or otherwise unfit,³³ the interests of the child should outweigh his parental right of custody. So, if a father deserts his wife and child when the child is helpless, and leaves her or others to perform his duties for him, the welfare of the child may outweigh his parental right, when he subsequently seeks the aid of the court to regain the custody which he has thus relinquished.³⁴ And even where he relinquishes the custody of his child to another at the latter's request, and for what he supposes to be the interests of the child, he may be regarded, in a sense, as having neglected his duty as a father; and his right to the child's custody when he seeks to regain it, particularly after the lapse of years, will have to yield to the child's interests.³⁵

Almost all the cases in which the father's right to the custody of his child has been denied are cases in which he was unfit to have the care of the child, or else cases in which he had relinquished his right for a time, and sought the aid of the court to regain custody. Manifestly, in these cases, he has no right to complain if the court regards the child's welfare as the controlling consideration, even where he is able, ready, and willing to perform his duty in the future.³⁶

³² *Marshall v. Reams*, 32 Fla. 499, 14 South. 95.

³³ *Chapsky v. Wood*, 26 Kan. 650; *Cowls v. Cowls*, 3 Gilm. (Ill.) 435.

³⁴ *McShan v. McShan*, 56 Miss. 413. And see *Schroeder v. State*, 41 Neb. 745. 60 N. W. 89; *Hewitt v. Long*, 76 Ill. 399.

³⁵ *Chapsky v. Wood*, supra; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *People v. Porter*, 23 Ill. App. 196. The child's interests, of course, may require it to be restored to the father in such a case. See *Armstrong v. Stone*, 9 Grat. (Va.) 102.

³⁶ *U. S. v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256; *Mercein v. People*, 25

"As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant; the law presuming it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and, if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."⁸⁷ "When an infant child or minor is out of the possession and custody of the father, and habeas corpus is resorted to by the latter to obtain such custody, it does not follow as necessary matter of right that the prayer of the petition will be granted. The court is clothed with a sound discretion to grant or refuse relief, always to be exercised for the benefit of the infant primarily, but not arbitrarily in disregard of the father's natural right to be preferred. If the father be reasonably suitable, and able to maintain and rear his child, his prayer should ordinarily be granted."⁸⁸

There may be cases in which the court, from a consideration of the child's welfare, would not award its custody to the father, even though no fault or neglect of duty could be imputed to him. A child of very tender years needs the care and attention of a mother, and even were she to desert the father, without any fault on his

Wend. (N. Y.) 64; Waldron's Case, 13 Johns. (N. Y.) 418; Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213; Ex parte Schumpert, 6 Rich. (S. C.) 344; Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. 91; State v. Stigall, 22 N. J. Law, 286; Bryan v. Lyon, 104 Ind. 227, 3 N. E. 880; In re Smith, 13 Ill. 138; Gishwiler v. Dodez, 4 Ohio St. 615; McShan v. McShan, 56 Miss. 413; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Gibbs v. Brown, 68 Ga. 803; Ex parte Murphy, 75 Ala. 409; Brinster v. Compton, 68 Ala. 299; Sturtevant v. State, 15 Neb. 459, 19 N. W. 617.

⁸⁷ Per Story, J., in U. S. v. Green, 3 Mason, 482, Fed. Cas. No. 15,256.

⁸⁸ Brinster v. Compton, 68 Ala. 299.

part, the child would not be taken from her, at least until it has reached an age when the father can properly care for it.³⁹ It can only be in such cases as this, where the child, from its extreme youth or sickness, needs a mother's care, that the court can deprive the father of the right to the child's custody, where the father can properly care for the child, and is in every way a fit person to have the charge of it, and has not in any way neglected the child or relinquished his rights. This is true in contentions between father and mother after they have separated, as well as in contentions between the father and strangers.⁴⁰

(3) In arriving at a determination as to what is best for the welfare and happiness of the child, the court will consider the ties of nature and of association;⁴¹ the character and feelings of the parties contending for the custody;⁴² the age,⁴³ health,⁴⁴ and sex of the child; the moral or immoral surroundings of its life; the bene-

³⁹ *In re Bort*, 25 Kan. 308; *McKim v. McKim*, 12 R. I. 462; *Ex parte Schumpert*, 6 Rich. (S. C.) 344; *Com. v. Addicks*, 5 Bin. (Pa.) 520; *State v. Paine*, 4 Humph. (Tenn.) 523; *State v. King*, 1 Ga. Dec. 93; *Miner v. Miner*, 11 Ill. 43; *Anon.*, 55 Ala. 428; *Com. Demott*, 64 Pa. St. 305, note; *Chandler v. Chandler*, 24 Mich. 176; *Scoggins v. Scoggins*, 80 N. C. 318. But see *Hewitt's Case*, 11 Rich. (S. C.) 326; *Carr v. Carr*, 22 Grat. (Va.) 168.

⁴⁰ See *McKim v. McKim*, *supra*; *Com. v. Addicks*, 2 Serg. & R. (Pa.) 174; *Com. v. Briggs*, 16 Pick. (Mass.) 203; *Bennett v. Bennett*, 43 Conn. 313; *Scoggins v. Scoggins*, 80 N. C. 318; *Welch v. Welch*, 33 Wis. 534; *Carr v. Carr*, 22 Grat. (Va.) 168.

⁴¹ Thus, where the father has allowed his child to be cared for and raised by others until it has become attached to them, this fact will influence the court in determining whether it will, after the lapse of years, give the custody to the father. "It is an obvious fact that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel." *Chap-sky v. Wood*, 26 Kan. 650. And see *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; note 59, *infra*.

⁴² *Richards v. Collins*, 45 N. J. 283, 17 Atl. 831; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. 728; *Holmes' Case*, 19 How. Prac. (N. Y.) 329.

⁴³ *Haskell v. Haskell*, 152 Mass. 16, 24 N. E. 859; *McKim v. McKim*, 12 R. I. 462; notes 39, *supra*, and 52, *infra*.

⁴⁴ *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831; *McKim v. McKim*, *supra*; *Gardenhire v. Hinds*, 1 Head (Tenn.) 402.

fits of education and development; and the pecuniary prospects.⁴⁵ All these considerations enter into the judicial determination.⁴⁶

Where the child has reached the age of discretion, it will often be allowed to make its own choice, and its wishes will always be taken into consideration.⁴⁷ But the choice of the child is not a controlling consideration. Welfare controls choice, and the court will not permit the choice of the child to lead it into an improper custody.⁴⁸ In this connection the rights of parents and guardians should also be respected, and such rights will not be disregarded by the court to gratify the mere wishes of a child, when the parent or guardian is a proper person to be intrusted with its custody.⁴⁹ There is no fixed age when the discretion of a child begins, but mental capacity is the test.⁵⁰

In Cases of Divorce.

Where a divorce is granted either to the husband or wife, it does not follow as a matter of course that the complainant in the divorce suit is entitled to the custody of the infant children. Here, as in other cases, the best interests of the child will determine its custody.⁵¹ If, for instance, the child is of such tender years, or in such delicate health, that it needs a mother's care, particularly if it is a girl, its custody will ordinarily be awarded to the mother, at

⁴⁵ *Armstrong v. Stone*, 9 Grat. (Va.) 102; *Lyons v. Blenkin*, Jac. 245; *Gardenhire v. Hinds*, 1 Head. (Tenn.) 402.

⁴⁶ *Marshall v. Reams*, 32 Fla. 499, 14 South. 95. See *Slater v. Slater*, 90 Va. 845, 20 S. E. 780.

⁴⁷ *Marshall v. Reams*, *supra*; *In re Goodenough*, 19 Wis. 274; *U. S. v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256; *State v. Bratton*, 15 Am. Law Reg. (N. S.) 359; *Clark v. Bayer*, 32 Ohio St. 299; *Brinster v. Compton*, 68 Ala. 299; *Merritt v. Swimley*, 82 Va. 433; *State v. Paine*, 4 Humph. (Tenn.) 523; *Shaw v. Nachtwey*, 43 Iowa, 653; *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831; *Hewitt v. Long*, 76 Ill. 399.

⁴⁸ *Marshall v. Reams*, *supra*.

⁴⁹ *Marshall v. Reams*, *supra*.

⁵⁰ *Marshall v. Reams*, *supra*; *Richards v. Collins*, *supra*.

⁵¹ *Adams v. Adams*, 1 Duv. (Ky.) 167; *Giles v. Giles*, 30 Neb. 624, 46 N. W. 916; *Haskell v. Haskell*, 152 Mass. 16, 24 N. E. 859; *In re Bort*, 25 Kan. 308; *Lusk v. Lusk*, 28 Mo. 91; *Welch v. Welch*, 33 Wis. 534; *Irwin v. Irwin*, 96 Ky. 318, 28 S. W. 664, and 30 S. W. 417; *Luck v. Luck*, 92 Cal. 653, 28 Pac. 787; *Kentzler v. Kentzler*, 3 Wash. St. 166, 28 Pac. 370; *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600; *Cowls v. Cowls*, 3 Gilm. (Ill.) 435.

least temporarily, even where the husband is without fault.⁵² And if one of the parties is an unfit person to have the custody of the children, and the other is a fit person, their custody will be awarded to the latter.⁵³

The decree in a divorce suit does not permanently settle the right to custody of children in awarding the custody to one of the parties. A change of circumstances may authorize the court to order a change of custody.⁵⁴ For instance, should the mother, to whom the custody of a child is awarded on divorce, afterwards become an unfit person to be intrusted with the child, the father, if a fit person, might obtain the custody. So, where the spouse to whom the custody is awarded, even though it may have been so awarded because of the unfitness of the other, afterwards dies, the other may obtain the custody, by showing that he has become fit for it, and that it will be for the child's interest.⁵⁵

Agreement as to Custody of Child.

The weight of authority seems to be in favor of the position that an agreement entered into by a father, for the relinquishment of his right to the custody of his child, is void as against public policy, and will not even bind him.⁵⁶ "The care and custody of minor chil-

⁵² See the cases above cited. And see *Messenger v. Messenger*, 56 Mo. 329; *Lusk v. Lusk*, 28 Mo. 91; *Chandler v. Chandler*, 24 Mich. 176; *Klein v. Klein*, 47 Mich. 518, 11 N. W. 367; *Draper v. Draper*, 68 Ill. 17. But see *Carr v. Carr*, 22 Grat. (Va.) 168; *Welch v. Welch*, 33 Wis. 534.

⁵³ *Irwin v. Irwin*, 96 Ky. 318, 30 S. W. 417; *Thiesing v. Thiesing* (Ky.) 26 S. W. 718; *Flory v. Ostrom*, 92 Mich. 622, 52 N. W. 1038; *Schichtl v. Schichtl*, 88 Iowa, 210, 55 N. W. 309. *Miner v. Miner*, 11 Ill. 43; *Cowls v. Cowls*, 3 Gilm. (Ill.) 435; *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600.

⁵⁴ *Draper v. Draper*, 68 Ill. 17; *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51. Compare *Wilkinson v. Deming*, 80 Ill. 342.

⁵⁵ *Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880. And see *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729.

⁵⁶ *Queen v. Smith*, 22 Law J. Q. B. 116; *In re Edwards*, 42 Law J. Q. B. 39; *State v. Baldwin*, 5 N. J. Eq. 454; *Chapsky v. Wood*, 26 Kan. 650; *Cook v. Bybee*, 24 Tex. 278; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *State v. Libbey*, 44 N. H. 321; *People v. Mercein*, 3 Hill (N. Y.) 410. This principle prevents a father from making an irrevocable agreement with his wife, on a separation, by which he relinquishes to her the custody of their children. *People v. Mercein*, supra. See also, *Johnson v. Terry*, 34 Conn. 259; *Town of Torrington v. Town of Nor-*

dren is a personal trust in the father, and he has no general power to dispose of them to another.”⁵⁷ Such an agreement, however, is not to be entirely ignored. “It is to be considered, not for the purpose of fixing the rights of the parties, but for the purpose of shedding light upon their actual relations and feelings for the infant, and assisting the exercise of a wise discretion by the court as to what disposition should be made of it for the promotion of its own welfare.”⁵⁸ In other words, although the law does not countenance agreements whereby a father seeks to transfer to another the custody of his child, such agreements, when carried out by the parties, may have the indirect effect of preventing the father from reasserting his right. The interests of the child in such cases being the controlling consideration, and it has frequently been held that the custody of a child will not be restored to a parent who has transferred its custody to another, where the child, by being thus separated from him for years, has transferred its interests and affections to its adopted home, and become estranged from its parent, on the ground that it would be a serious injury to the child to sever the ties that bind it to its adopted home and its adopted parents, and compel it to return.⁵⁹ “After the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of the court in his favor. His parental right must yield to the feelings, interests, and rights of others acquired with his consent.”⁶⁰

Some of the courts, contrary to the view above stated, have held

wich, 21 Conn. 543; *VanSittart v. VanSittart*, 2 De Gex & J. 249; *Hope v. Hope*, 26 Law J. Ch. 417. Contra, *State v. Smith*, 6 Greenl. (Me.) 463; *Bently v. Terry*, 59 Ga. 555. See note 61, *infra*.

⁵⁷ *State v. Baldwin*, *supra*.

⁵⁸ *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798.

⁵⁹ *Weir v. Marley*, *supra*; *Chapsky v. Wood*, 26 Kan. 650; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831; *Bently v. Terry*, 59 Ga. 555; *Merritt v. Swimley*, 82 Va. 433; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. 728; *Hoxsie v. Potter*, 16 R. I. 374, 17 Atl. 129; *In re Murphy*, 12 How. Prac. (N. Y.) 513; *Clark v. Bayer*, 32 Ohio St. 299.

⁶⁰ *Clark v. Bayer*, *supra*.

that a parent can, by agreement, surrender the custody of his infant child so as to make the custody of him to whom he surrenders it legal as against him.⁶¹ Even in these jurisdictions, however, a parent cannot, by surrendering the custody of his child to another, prevent the courts from changing the custody where the welfare of the child demands it.⁶²

As has been shown in a previous chapter, statutes have been enacted in most states by which parents may consent to the adoption of their children by another. Here, of course, the legal adoption is binding.⁶³ So, as will be seen in a subsequent chapter, parents may bind out their children as apprentices.⁶⁴

PARENT'S RIGHT TO CHILD'S SERVICES AND EARNINGS.

126. The father, and, by the weight of authority, the mother on his death, is entitled to a minor child's services and earnings, while the child lives with and is supported by them, and has not been emancipated. When he has been emancipated, however, this right ceases, and with it, of course, all rights which are dependent upon it.⁶⁵

So long as a minor child lives with or is supported by its parents, and has not been emancipated, the father is entitled to its services and earnings.⁶⁶ The right to a child's services is generally said to be

⁶¹ *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91. And see *Bently v. Terry*, 59 Ga. 555; *State v. Smith*, 6 Greenl. (Me.) 463; *McDowle's Case*, 8 Johns. (N. Y.) 328; *State v. Barrett*, 45 N. H. 15; *Curtis v. Curtis*, 5 Gray (Mass.) 535; *Dumain v. Gwynne*, 10 Allen (Mass.) 270; *Com. v. Barney*, 4 Brewst. (Pa.) 409; *In re Goodenough*, 19 Wis. 274.

⁶² *Bonnett v. Bonnett*, *supra*; *Chapsky v. Wood*, 26 Kan. 650.

⁶³ *Ante*, p. 221.

⁶⁴ *Post*, p. 452.

⁶⁵ As to the emancipation of children, see *post*, p. 258.

⁶⁶ 1 Bl. Comm. 453; *Benson v. Remington*, 2 Mass. 113; *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11,233; *Gale v. Parrot*, 1 N. H. 28; *Lord v. Poor*, 23 Me. 569; *Magee v. Magee*, 65 Ill. 255; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Allen v. Allen*, 60 Mich. 635, 27 N. W. 702. And see the cases cited in the following notes. If a minor, with his parent's consent, enlists in the army or navy, the parent's right of control is suspended, and all pay, bounties,

based on the parent's duty to support the child,⁶⁷ but the right is recognized even in those jurisdictions where it is denied that there is any legal duty to support. Whatever may be the foundation of this right of the parent, its existence is well settled. There is some authority to the effect that the right to a child's services and earnings does not vest in the mother, even when the father has deserted her and the child, or is dead; that the mother, even under such circumstances as these, is entitled only to reverence and respect, and has no authority over the child, or right to its services.⁶⁸ This, however, is a mistake, due perhaps, to some extent, to following, without reason or other authority, the dictum of Blackstone and other old writers and judges to that effect, and to a failure to recognize the fact that there is no longer any such principle or doctrine as the old feudal doctrine, "which, requiring, as it did, the abject subjection and servitude of the wife, was unable to recognize the supremacy of the mother."⁶⁹ By the overwhelming weight of modern authority, a widowed mother is entitled to the services and earnings of a minor child to the same extent as the father would be if living.⁷⁰ The same rule applies where a wife is deserted by her husband, or he is im-

and prize moneys belong to the minor, and not to the parent. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821; *Gapen v. Gapen* (W. Va.) 23 S. E. 579; *Taylor v. Bank*, 97 Mass. 345; *Banks v. Conant*, 14 Allen (Mass.) 497; *Magee v. Magee*, 65 Ill. 255; *Cadwell v. Sherman*, 45 Ill. 348; *Baker v. Baker*, 41 Vt. 55; *Mears v. Bickford*, 55 Me. 528. *Contra*, *Bundy v. Dodson*, 28 Ind. 295; *Ginn v. Ginn*, 38 Ind. 526.

⁶⁷ 2 Kent, Comm. 193; *Jenness v. Emerson*, 15 N. H. 488. In *Canovar v. Cooper*, 3 Barb. (N. Y.) 117, it was said by Strong, P. J.: "The reason why parents are entitled to the services of their minor children, usually given, is that which I have already mentioned,—the liability to support them. But, in my opinion, a much stronger reason, and one more consonant with the feelings and obligations of parent and child, is that it gives the parent the control over the actions of his children when they are incapable of judging for themselves, and thus has a tendency to save them from the effects of idleness or imprudence."

⁶⁸ *Pray v. Gorham*, 31 Me. 240; *Com. v. Murray*, 4 Bin. (Pa.) 487; *Fairmount & A. St. Pass. Ry. Co. v. Stutler*, 54 Pa. St. 375.

⁶⁹ *Hammond v. Corbett*, 50 N. H. 501.

⁷⁰ *Hammond v. Corbett*, *supra*; *Matthewson v. Perry*, 37 Conn. 435; *Nightingale v. Withington*, 15 Mass. 272; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581; *Kennedy v. New York Cent. & H. R. R. Co.*, 35 Hun (N. Y.) 186;

prisoned, and she is left to maintain her children, for the same reasons for the rule apply in both cases.⁷¹

Since a parent is thus entitled to the earnings of his minor child, it follows that where he has not expressly or impliedly emancipated the child, or consented to its receiving and enjoying its own earnings, as hereafter explained,⁷² he may maintain an action for the child's wages against one who has employed the child, and the action is properly brought in the parent's name alone.⁷³ It has been held that the right to the child's services is personal to the parent, like the right of custody, and cannot be assigned to another, as by binding the child out at service.⁷⁴ But there are other decisions in favor of allowing a parent to assign his child's services for a consideration to inure to himself.⁷⁵

In the absence of emancipation, express or implied, a child cannot make any contract with another to serve him which will be binding on the father; nor can he give a valid discharge for his wages. One who, under such circumstances, pays a minor for services, or for injuries resulting in loss of service, does so at his peril; and, if the father has not relinquished his right to such services, the payment will be no defense in an action by the father.⁷⁶ The same principle applies where an apprentice is employed without his master's con-

Gray v. Durland, 50 Barb. (N. Y.) 100; Ballard v. Advertiser Co., 52 Vt. 325; Hollingsworth v. Swedenborg, 49 Ind. 378; State v. Baltimore & O. R. Co., 24 Md. 84; Cain v. Devitt, 8 Iowa, 116; Dufield v. Cross, 12 Ill. 397; Snediker v. Everingham, 27 N. J. Law, 143; Campbell v. Campbell, 11 N. J. Eq. 272; post, p. 276.

⁷¹ See Wodell v. Coggeshall, 2 Metc. (Mass.) 89; Chilson v. Philips, 1 Vt. 41; Winslow v. State, 92 Ala. 78, 9 South. 728; Savannah, F. & W. Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157.

⁷² Post, p. 258.

⁷³ Shute v. Dorr, 5 Wend. (N. Y.) 203; Dufield v. Cross, 12 Ill. 397; Hollingsworth v. Swedenborg, 49 Ind. 378; Monaghan v. School Dist., 38 Wis. 100.

⁷⁴ Musgrove v. Kornegay, 7 Jones (N. C.) 71 (collecting cases); U. S. v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497.

⁷⁵ Day v. Everett, 7 Mass. 145; State v. Barrett, 45 N. H. 15; Johnson v. Bicknell, 23 Me. 154; Ford v. McVay, 55 Ill. 119.

⁷⁶ White v. Henry, 24 Me. 531; Weeks v. Holmes, 12 Cush. (Mass.) 215; Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581; Sherlock v. Kimmell, 75 Mo. 77; Dunn v. Altman, 50 Mo. App. 231.

sent.⁷⁷ The father, where his child is employed without his consent, may ratify the contract made with the child, and recover under it; or he may repudiate it, and recover the value of the services.⁷⁸

Since the earnings of a minor unemancipated child belong to the father, they may be reached by the father's creditors, and subjected to the payment of their claims, just like any other property.⁷⁹ And the same is true of property purchased with the child's earnings. It was held in a late Texas case, for instance, that land bought by a mother with the wages given her by her son, who was not emancipated, was subject to the claims of the father's creditors.⁸⁰

When a child is emancipated,—that is, when he is released from parental control, either by the consent of the parent or by operation of law, including cases in which he is deserted,—the parent's right to the child's services and earnings ceases, and with it, of course, all rights, duties, and liabilities which are dependent upon its existence also cease.⁸¹

EMANCIPATION OF CHILDREN.

127. A child may be released from parental control, and become entitled to his earnings, in which event he is said to be emancipated.

128. Emancipation may be effected

(a) By the consent of the parent, evidenced by written or oral agreement, or gathered from the circumstances.

(b) By operation of law—

(1) Where the parent abandons or fails to support the child.

⁷⁷ *James v. Le Roy*, 6 Johns. (N. Y.) 274; *Bowes v. Tibbets*, 7 Me. 457; *Munsey v. Goodwin*, 3 N. H. 272.

⁷⁸ *Sherlock v. Kimmell*, 75 Mo. 77.

⁷⁹ *Atwood v. Holcomb*, 39 Conn. 270; *Beaver v. Bare*, 104 Pa. St. 58; *Dick v. Grissom*, 1 Freem. (Miss.) 428; *Doe v. Reid*, 8 Jones (N. C.) 377; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 15 S. W. 259.

⁸⁰ *Schuster v. Bauman Jewelry Co.*, *supra*.

⁸¹ *Post*, p. 259; *Winslow v. State*, 92 Ala. 78, 9 South. 728.

(2) Where the child contracts a valid marriage, either with or without the parent's consent.

(3) Where the child attains his majority, which is at 21 years, or, in some jurisdictions, in the case of females, 18 years.

(c) A parent who, by his conduct, leads an employer of a child to believe that the child has a right to his earnings, and to pay the child, is concluded by the payment, on the equitable principle of estoppel.

129. The emancipation, if without consideration, may be revoked before it is acted upon by the child, but not afterwards. If supported by a valuable consideration, or, at common law, if it is under seal, it cannot be revoked.

130. Emancipation, as regards future services and earnings, is valid as against creditors of the parent.

A child may be released from parental control, and become entitled to his earnings, or, in other words, he may become emancipated, either by the consent of his parent, or by operation of law without such consent. The effect of emancipation is to deprive the parent of all power of control over the child, so long as the emancipation continues. The child becomes entitled to his time and his earnings, and to property purchased with his earnings, free from any claims of his parent, or of his parent's creditors,⁸² and, on his death, his earnings pass to his administrator.⁸³

⁸² *Atwood v. Holcomb*, 39 Conn. 270; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Kain v. Larkin*, 131 N. Y. 300, 36 N. E. 105; *Terrens v. Campbell*, 74 Pa. St. 470; *Beaver v. Bare*, 104 Pa. St. 58; *Partridge v. Arnold*, 73 Ill. 600; *Snediker v. Everingham*, 27 N. J. Law. 143; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570; *Gale v. Parrot*, 1 N. H. 28; *Hall v. Hall*, 44 N. H. 293; *Jenney v. Alden*, 12 Mass. 375; *Nightingale v. Withington*, 15 Mass. 272; *Whiting v. Earle*, 3 Pick. (Mass.) 201; *Morse v. Welton*, 6 Conn. 547; *Chase v. Elkins*, 2 Vt. 290; *Varney v. Young*, 11 Vt. 258; *Tillotson v. McCrillis*, Id. 477; *Wilson v. McMillan*, 62 Ga. 16; *Wambold v. Vick*, 50 Wis. 456, 7 N. W. 438.

⁸³ *Smith v. Knowlton*, 11 N. H. 191; *Dierker v. Hess*, 54 Mo. 246.

Not only may a parent emancipate his child, so as to entitle it to receive its earnings from third persons, but "emancipation may be implied even when the minor resides at home and works for his father, from a promise on the part of the father to pay him for his services during his minority, so that the minor may maintain an action against the father even for such services."⁸⁴ Because of the relation, the presumption is against any such contract, and the child must show affirmatively that there was an understanding that compensation should be paid.

How Emancipation may be Effected—By Consent of Parent.

Emancipation may be effected by the consent of the parent, or it may be effected by operation of law without his consent. The clearest case of emancipation by consent is where the child can show an express written or oral agreement with the parent.⁸⁵ Here there can be no difficulty. Emancipation by consent may also, like any other agreement, be implied as a matter of fact from the conduct of the parties. No particular act or ceremony is necessary to constitute emancipation. It may be established by direct evidence, or implied from circumstances; and it may, as has already been seen,⁸⁶ be implied as well when the child continues to reside at home as when he lives elsewhere. Like any other fact, its existence or nonexistence is to be determined by all the circumstances of the particular case.⁸⁷

⁸⁴ Wood, Mast. & Serv. § 25; Wilson v. McMillan, 62 Ga. 16; Hall v. Hall, 44 N. H. 293; Beaver v. Bare, 104 Pa. St. 58; McCloskey v. Cyphert, 27 Pa. St. 220; Steel v. Steel, 12 Pa. St. 64; Dierker v. Hess, 54 Mo. 246; Donegan v. Davis, 66 Ala. 362; Sword v. Keith, 31 Mich. 246; Sammon v. Wood (Mich.) 65 N. W. 529.

⁸⁵ Hall v. Hall, 44 N. H. 293; Atwood v. Holcomb, 39 Conn. 270; Chase v. Smith, 5 Vt. 556; Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105. An oral agreement, of course, may be unenforceable, because within the statute of frauds. Shute v. Dorr, 5 Wend. (N. Y.) 204.

⁸⁶ Supra, note 84.

⁸⁷ Canovar v. Cooper, 3 Barb. (N. Y.) 115; Shute v. Dorr, 5 Wend. (N. Y.) 204; Whiting v. Earle, 3 Pick. (Mass.) 201; Inhabitants of Dennysville v. Inhabitants of Trescott, 30 Me. 470; Inhabitants of Gardiner v. Inhabitants of Manchester, 72 Me. 509; Penn v. Whitehead, 17 Grat. (Va.) 503; Johnson v. Silsbee, 49 N. H. 543; Beaver v. Bare, 104 Pa. St. 58; Donegan v. Davis, 66 Ala. 362; Haugh Ketcham & Co. Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Everett v. Sherfey, 1 Iowa, 357; Schoenberg v. Voigt, 36 Mich. 310.

Same—By Operation of Law.

Emancipation may also be effected by operation of law, and even against the will of the parent. It is so effected by the valid marriage of the child.⁸⁸ So, where a child reaches his majority, the parent's rights over him, and to his services and earnings, cease, and the child is emancipated by operation of law.⁸⁹ At common law, the age of majority is 21 years for both sexes, but, by statute, in some jurisdictions a female reaches her majority at 18.

It is said that emancipation will be inferred from the wrongful conduct of a parent indicating a renunciation of the parental relation, as when he abandons or forces his child to leave him, or neglects to support him, so that it is necessary for the child to support himself. It is better, however, to class emancipation thus effected as emancipation by operation of law; for willingness of the parent, under such circumstances, is altogether immaterial. The law emancipates the child. A parent is only entitled to the services and earnings of his child while the child is supported by him. "Although the general principle is clear and unquestioned that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet it seems to be equally clear that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist; and such we hold to be the law."⁹⁰ It has therefore been held that, where a widow marries again, she cannot recover the wages

⁸⁸ *Aldrich v. Bennett*, 63 N. H. 415; *Dick v. Grissom*, *Freem. Ch.* (Miss.) 428; *Town of Northfield v. Town of Brookfield*, 50 Vt. 62; *Inhabitants of Taunton v. Inhabitants of Plymouth*, 15 Mass. 203; *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706; *Town of Craftsbury v. Town of Greensboro*, 66 Vt. 585, 29 Atl. 1024. The fact that the marriage is against the parent's will can make no difference, if the marriage is valid. *Aldrich v. Bennett*, *supra*; *Com. v. Graham*, *supra*. But see *White v. Henry*, 24 Me. 531. As to the validity of such marriages, see *ante*, p. 31.

⁸⁹ *Town of Poultney v. Town of Glover*, 23 Vt. 328; *Brown v. Ramsay*, 29 N. J. Law, 117; *Mercer v. Jackson*, 54 Ill. 397.

⁹⁰ *Farrell v. Farrell*, 3 *Houst. (Del.)* 633. And see *Hollingsworth v. Swedenborg*, 49 Ind. 378; *Inhabitants of Wells v. Inhabitants of Kennebunk*, 8 *Greenl. (Me.)* 200.

due her daughter by her first husband, who does not live with her, and is not supported by her.⁹¹ And the rule is well settled "that if the father abandons the child, and leaves him to provide for himself, the child becomes entitled to his earnings as a means of support, and the father has no claim upon them."⁹² "As the father may forfeit his right to the custody and control of his child's person by abusing his power, so, by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruit of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all the child's earnings. It would be recognizing in fathers something like that pre-eminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them, in relation to him, in the category of things instead of that of persons."⁹³

Same—Estoppel of Parent.

If a parent, by his conduct, leads others to reasonably believe that he has emancipated his child, and such others act upon this belief, the parent will be estopped to deny emancipation to their prejudice, though there has been no emancipation either in fact or in law. If, for instance, a child makes a contract, on his own account, to serve another, and the father knows of it, and makes no objection, the other party to the contract may safely pay the child his earnings, and the payment will bar a claim to such earnings by the

⁹¹ Hollingsworth v. Swedenborg, *supra*. And see *Inhabitants of St. George v. Inhabitants of Deer Isle*, 3 Greenl. (Me.) 390.

⁹² *Atwood v. Holcomb*, 39 Conn. 270. See, also, *Wodell v. Coggeshall*, 2 Mete. (Mass.) 89; *Chilson v. Philips*, 1 Vt. 41; *Cloud v. Hamilton*, 11 Humph. (Tenn.) 104; *Nightingale v. Withington*, 15 Mass. 275; *Ream v. Watkins*, 27 Mo. 516; *Canovar v. Cooper*, 3 Barb. (N. Y.) 115; *The Etna*, 1 Ware, 474, Fed. Cas. No. 4,542; *Stansbury v. Bertron*, 7 Watts & S. (Pa.) 362; *McCarthy v. Railroad Corp.*, 148 Mass. 550, 20 N. E. 182; *Liberty v. Palermo*, 79 Me. 473, 10 Atl. 455; *Brown v. Ramsay*, 29 N. J. Law, 117; *Loy v. Loy*, 128 Ind. 150, 27 N. E. 351; *Clay v. Shirley*, 65 N. H. 644, 23 Atl. 521.

⁹³ *The Etna*, *supra*.

father.⁹⁴ There is no necessity to ask whether there has been an emancipation in fact.⁹⁵ It is sufficient to apply the equitable principle that "where one voluntarily, by his words or conduct, causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position for the worse, the former is concluded from averring against the latter a different state of things as existing at the same time."⁹⁶ Such conduct does not necessarily conclude the parent as against the child, nor would it prevent him, in the absence of an emancipation in fact, from claiming the wages before payment, and thereby rendering the employer liable to him.⁹⁷ Acquiescence by the father, however, in the child's contracting on his own account, and receiving and using his wages, would be evidence from which a jury might infer emancipation in fact.⁹⁸

Consideration—Revocation.

The relinquishment by a parent of his right to the services and earnings of his child is valid as a gift, and, as between the parties, it requires no consideration. When a child performs labor for his parent, under an agreement that he shall be compensated therefor by the parent, or performs labor for another under an agreement with the parent that he (the child) shall own what he receives, the parent will be bound by the agreement, though there is no consideration for the relinquishment of his rights.⁹⁹ "The cases referred to establish the doctrine that it (the right to the child's services) may be transferred to the minor. It is to be regarded as being in the nature of property, and, as a minor may hold other property

⁹⁴ *Whiting v. Earle*, 3 Pick. (Mass.) 201; *Atkins v. Sherbino*, 58 Vt. 248. 4 Atl. 703; *Nixon v. Spencer*, 16 Iowa, 214; *Armstrong v. McDonald*, 10 Barb. (N. Y.) 300; *Smith v. Smith*, 30 Conn. 111; *Schoonover v. Sparrow*, 38 Minn. 393. 37 N. W. 949.

⁹⁵ *Atkins v. Sherbino*, *supra*.

⁹⁶ *Fetter*, Eq. 45.

⁹⁷ *Atkins v. Sherbino*, *supra*.

⁹⁸ *Lackman v. Wood*, 25 Cal. 147; *Scott v. White*, 71 Ill. 287.

⁹⁹ *Fort v. Gooding*, 9 Barb. (N. Y.) 371; *Stanley v. Bank*, 115 N. Y. 122, 22 N. E. 29; *Atwood v. Holcomb*, 39 Conn. 270; *Chase v. Smith*, 5 Vt. 556; *Abbott v. Converse*, 4 Allen (Mass.) 530; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Gale v. Parrot*, 1 N. H. 28; *Morse v. Welton*, 6 Conn. 547; *Snediker v. Everingham*, 27 N. J. Law, 143.

independently of his father, there seems to be no valid reason why he may not thus hold the right to his own time and earnings. * * * As it may be held by gift or license, there is no reason why the gift, when accepted, should be any more revocable, without the consent of the donee, than other gifts."¹⁰⁰

If the emancipation is without consideration, however, it may be revoked at any time before it is acted upon, and from the time of revocation the parent is restored to his original rights.¹⁰¹ It is a mere gift or license, and, like any other gift or license, it may be revoked at any time before it is accepted, and acceptance is acting upon it. "A gift is not binding on the donor until accepted; and the acceptance of a gift of this character must be by acting upon it. Until it is acted upon, it must, from the nature of the case, be revocable."¹⁰²

If the relinquishment of his rights by the parent is supported by a valuable consideration, or, at common law at least, if his agreement is under seal, he cannot revoke. "As he [the minor] may hold it [his time and right to earnings] by a contract with his father under seal, or for a valuable consideration, there is no more reason for holding that the father may revoke this contract at his pleasure than any other contract. On principle, he should be as fully bound by it as by a conveyance of land or other property to his child."¹⁰³

Rights of Parent's Creditors.

The emancipation of a child, and relinquishment by the parent of his right to the future services and earnings of the child, is perfectly valid as against the parent's creditors, even though the parent may be insolvent, and even though the intention is to prevent the creditors from enforcing their claims against such earnings, or property purchased with them.¹⁰⁴ And this is true though the child

¹⁰⁰ Abbott v. Converse, supra.

¹⁰¹ Abbott v. Converse, 4 Allen (Mass.) 530; Dickinson v. Talmage, 138 Mass. 249; Everett v. Sherfey, 1 Iowa, 356; Soldanels v. Railway Co., 23 Mo. App. 516; Clark v. Fitch, 2 Wend. (N. Y.) 459; Chase v. Elkins, 2 Vt. 290; Stovall v. Johnson, 17 Ala. 19.

¹⁰² Abbott v. Converse, supra.

¹⁰³ Abbott v. Converse, supra.

¹⁰⁴ Wilson v. McMillan, 62 Ga. 16; Atwood v. Holcomb, 39 Conn. 270; Manchester v. Smith, 12 Pick. (Mass.) 113; Wambold v. Vick, 50 Wis. 456, 7 N.

remains at home, and is hired by the parent.¹⁰⁵ As was said by the North Carolina court: "A creditor cannot make his debtor work in order to pay the debt, nor can he force him to make his children work, or sell under execution the valuable interest which a father has in the services of the child."¹⁰⁶ And, as was said by the Pennsylvania court, a father "is not bound to work his son or daughter as he would work a horse or slave for the benefit of his creditors."¹⁰⁷ If, however, such an arrangement is merely colorable, and the parent is in fact still to have the benefit of the wages, the transaction is fraudulent and void as against creditors.¹⁰⁸ And, where the wages are already earned, the gift of them would be subject to the general rules governing voluntary conveyances.¹⁰⁹

ACTION BY PARENT FOR INJURIES TO CHILD.

131. When a child is injured by the wrongful act or omission of a person, the father, or any other person standing in loco parentis, may maintain an action against the wrongdoer to recover for the resulting loss of service and incidental expenditures.

132. The rules as to the necessity of showing the relationship of master and servant between the parent and child to entitle the parent to sue may be thus stated:

W. 438; *Lord v. Poor*, 23 Me. 569; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570; *McCloskey v. Cyphert*, 27 Pa. St. 220; *Partridge v. Arnold*, 73 Ill. 600; *Winchester v. Reid*, 8 Jones (N. C.) 379; *Johnson v. Silsbee*, 49 N. H. 543; *Chase v. Elkins*, 2 Vt. 290; *Bray v. Wheeler*, 29 Vt. 514; *Lackman v. Wood*, 25 Cal. 147; *Dierker v. Hess*, 54 Mo. 250; *Furrh v. McKnight* (Tex. Civ. App.) 26 S. W. 95.

¹⁰⁵ *Wilson v. McMillan*, *supra*; *Dierker v. Hess*, *supra*; *Hall v. Hall*, 44 N. H. 293.

¹⁰⁶ *Winchester v. Reid*, *supra*.

¹⁰⁷ *McCloskey v. Cyphert*, *supra*.

¹⁰⁸ *Atwood v. Holcomb*, *supra*; *Wilson v. McMillan*, *supra*.

¹⁰⁹ *Beaver v. Bare*, *supra*; *Winchester v. Reid*, *supra*; *Dick v. Grissom*, 1 Freem. (Miss.) 428.

(a) To recover for loss of service, the right to the child's services, and therefore the relationship of master and servant, actual or constructive, must be shown. The relationship exists constructively if there is a right to service. Therefore—

- (1) If the child is a minor, living at home, service is presumed.
- (2) Temporary absence of the child from home will not prevent a recovery, if the parent has a right to its services.
- (3) By the weight of authority in this country, but not in England, the parent may recover if he has not relinquished his right to reclaim the child's services at any time, though the child, at the time of the injury, may be in the actual service of another, even with the parent's consent, and even though the child does not intend to return.
- (4) If the parent has relinquished his right to the child's services, he cannot recover on the theory of loss of service.

(b) On the theory that loss of service at the time of action is the gist of the action by a parent for an injury to his child, it is held in England that there can be no recovery at all where there has been no loss of service, as where the child is too young to render any service. But, by the weight of authority in this country, there may be a recovery for incidental expenses in caring for the child, and there may be a recovery for prospective loss of services, however young the child may be.

133. At common law, an action would not lie for an injury resulting in the immediate death of the child; but a right of action in such a case is very generally given by statute.

Where a child is injured by the wrongful conduct of another, and the injury results in direct and proximate damage to the parent, the tort gives rise to two causes of action,—one in the parent, and one in the child. The two causes of action are separate and distinct. The child cannot sue for the damage to the parent, nor can the parent sue for the damage to the child. Each must sue for his own damage, and neither action is a bar to the other.¹¹⁰

Where the wrong results in damage to the child only, no action can be maintained by the parent. A father cannot maintain an action for the wrongful exclusion of his child from school, for the child alone is damaged.¹¹¹ Where a child is injured by an assault and battery, the child alone can sue for the personal injury, including the physical and mental suffering, and the expense, if any, incurred by him; for this damage is to him, and not to the parent.¹¹² As will be seen in a subsequent section, the same is true where a daughter is seduced or debauched. Her father cannot maintain an action therefor at common law, unless he is specially damaged. For the mere seduction, the action, if it can be maintained at all, must be brought by the daughter.¹¹³ And so it is in other cases; a parent cannot in any case maintain an action for an injury to his child alone, unless he brings the action in the name of the child.

If, however, a wrong results in a direct injury to the parent, as distinguished from the injury to the child, the parent ought to have a right of action.

Loss of Services of Child.

Since a parent having the care and custody of his child has a right to his services and earnings, any wrongful act or omission of a person, the direct result of which is to cause him to lose such services temporarily or permanently, is an injury to him, as distinguished from the injury to the child; and the authorities are therefore agreed that, if he has sustained such a loss, he may maintain an action therefor. And in such an action he may re-

¹¹⁰ *Wilton v. Railroad Co.*, 125 Mass. 130; *Karr v. Parks*, 44 Cal. 46.

¹¹¹ *Boyd v. Blaisdell*, 15 Ind. 73; *Donahue v. Richards*, 38 Me. 376.

¹¹² *Cowden v. Wright*, 24 Wend. (N. Y.) 429; *Rogers v. Smith*, 17 Ind. 323; *Wilton v. Railroad Co.*, 125 Mass. 130.

¹¹³ *Post*, p. 278.

cover, not only for the loss up to the time the action is brought, but also, since he can recover but once for the wrong, for any loss of service during the child's minority which, in the judgment of the jury, and according to the evidence, will be sustained in the future.¹¹⁴ This is true of any injury to a child resulting directly in loss of services to the parent. It is true of an assault and battery,¹¹⁵ of negligence resulting in personal injuries,¹¹⁶ of malicious prosecution or false imprisonment,¹¹⁷ and of injuries inflicted by vicious animals negligently permitted to run at large.¹¹⁸ As will be seen more at length in subsequent sections, it is also true of the seduction or debauching of a daughter,¹¹⁹ and of the abduction, enticing away, or harboring of a child.¹²⁰

Expenses Incurred by Reason of the Wrong.

If a parent is put to extra expense in the support and maintenance of his children, by reason of the tortious conduct of another, constituting an interference with his legal rights as parent, he should be allowed to recover for such expense from the wrongdoer. Thus, in case of an assault and battery committed upon his child, or any other tortious conduct towards the child, resulting in personal injuries, the parent should recover for the medical or other expenses incurred in curing and caring for him. His right to recover such damages is conceded by all the authorities where the relation of master and servant exists, actually or constructively, and the

¹¹⁴ Russell v. Corne, 2 Ld. Raym. 1032; Wilton v. Railroad Co., 125 Mass. 130; Cowden v. Wright, 24 Wend. (N. Y.) 429; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104; Rogers v. Smith, 17 Ind. 323; Dufield v. Cross, 12 Ill. 397; Kerr v. Forgue, 54 Ill. 482; Magee v. Holland, 27 N. J. Law, 86; Shields v. Yonge, 15 Ga. 349; Kennard v. Burton, 25 Me. 39; Klingman v. Holmes, 54 Mo. 304; H. & G. N. R. Co. v. Miller, 49 Tex. 322.

¹¹⁵ Cowden v. Wright, 24 Wend. (N. Y.) 429; Klingman v. Holmes, 54 Mo. 304; Hoover v. Heim, 7 Watts (Pa.) 62; Trimble v. Spiller, 7 T. B. Mon. (Ky.) 394.

¹¹⁶ Kennard v. Burton, 25 Me. 39; Shields v. Yonge, 15 Ga. 349; Wilton v. Railroad Co., 125 Mass. 130; H. & G. N. R. Co. v. Miller, 49 Tex. 322.

¹¹⁷ Rogers v. Smith, 17 Ind. 323.

¹¹⁸ Durden v. Barnett, 7 Ala. 169; Karr v. Parks, 44 Cal. 46.

¹¹⁹ Post, p. 278.

¹²⁰ Post, p. 284.

injury also results in a loss of the child's services.¹²¹ This rule not only applies to expenses in curing personal injuries, but, as will be seen, it also applies to medical and other expenses in caring for a daughter who has been seduced or debauched,¹²² and to expenses in regaining the custody of an abducted child.¹²³

Whether or not a parent can recover for expenses in caring for and curing an injured child, independently of any loss of services, is a question upon which the authorities are conflicting.¹²⁴

Necessity to Show Loss of Service.

It is clear, of course, that there can be no recovery as for loss of services, unless a loss of service can be shown. Therefore, where the damages sought to be recovered in any particular case are for the loss of services of the child, it must appear that the relationship of master and servant, actual or constructive, exists between the plaintiff and the child.¹²⁵ If the child has been wholly emancipated by the parent, so that he is not entitled to his services, there can be no recovery on the theory of a loss of service.¹²⁶ Nor, it seems clear, can there be any recovery on such a theory by a parent who, by desertion and nonsupport, has forfeited all right to his child's services, or impliedly emancipated him.¹²⁷

If a minor child has not been emancipated, and the parent, by his conduct, has not lost the right to his services, the relationship of master and servant will be presumed, and no proof of acts of service is necessary. It is the right to the child's service, and not actual performance of services, that determines the right to re-

¹²¹ Russell v. Corne, 2 Ld. Raym. 1032; Wilton v. Railroad Co., 125 Mass. 130; Rogers v. Smith, 17 Ind. 323; Magee v. Holland, 27 N. J. Law, 86; Klingman v. Holmes, 54 Mo. 304; Cuming v. Railway Co., 109 N. Y. 95, 16 N. E. 65.

¹²² Post, p. 278.

¹²³ Post, p. 284.

¹²⁴ Post, p. 273.

¹²⁵ Martin v. Payne, 9 Johns. (N. Y.) 387.

¹²⁶ McCarthy v. Railroad Corp., 148 Mass. 550, 20 N. E. 182. Emancipation of a minor child is a question of fact. If the parent continues to exercise authority, and the child to submit to it, the relation of master and servant continues. Sutton v. Huffman, 32 N. J. Law, 58; Hudkins v. Haskins, 22 W. Va. 645.

¹²⁷ Wodell v. Coggeshall, 2 Metc. (Mass.) 89. As to what constitutes emancipation, express and implied, see ante, p. 258.

cover.¹²⁸ The mere temporary absence of a child from home, therefore, at the time of his injury, will not defeat a recovery by the parent, if the parent has a right to his services.¹²⁹

In England it is held that there is no right of action in the parent, on the theory of loss of service, where the child has left home, and is in the service of another, at the time of the injury; and that it can make no difference that the parent has not bound the child out, and can reclaim his services at any time, or even that the child's departure is against the parent's will.¹³⁰ In this country the rule is different in most states, if not in all. It is held that, if the parent has not emancipated the child or otherwise forfeited the right to his services, he may at any time compel the child to return and serve him; and the child, therefore, is still constructively in the parent's service.¹³¹ The American doctrine necessarily results from the principle that it is the right to a minor child's services, and not present acts of service, at the time of the injury, that determines the right to recover.¹³² The

¹²⁸ *Jag. Torts*, 452; *Evans v. Walton*, L. R. 2 C. P. 615; *Maunder v. Venn*, *Moody & M.* 323; *Manvell v. Thomson*, 2 Car. & P. 303; *Terry v. Hutchinson*, L. R. 3 Q. B. 599; *Herring v. Jester*, 2 *Houst. (Del.)* 66; *Parker v. Meek*, 3 *Sneed (Tenn.)* 29; *Emery v. Gowen*, 4 *Greenl. (Me.)* 33; *Mercer v. Walmsley*, 5 *Har. & J. (Md.)* 27; *Kennedy v. Shea*, 110 *Mass.* 147; *Martin v. Payne*, 9 *Johns. (N. Y.)* 387; *Bartley v. Richtmyer*, 4 *N. Y.* 39; *Boyd v. Byrd*, 8 *Blackf. (Ind.)* 113; *Mulvehall v. Millward*, 11 *N. Y.* 343.

¹²⁹ *Martin v. Payne*, 9 *Johns. (N. Y.)* 387; *Boyd v. Byrd*, 8 *Blackf. (Ind.)* 113.

¹³⁰ *Dean v. Peel*, 5 *East*, 45; *Davies v. Williams*, 10 *Q. B.* 725; *Hedges v. Tagg*, L. R. 7 *Exch.* 283; *Blaymire v. Haley*, 6 *Mees. & W.* 55; *Thompson v. Ross*, 5 *Hurl. & N.* 16.

¹³¹ *Martin v. Payne*, 9 *Johns. (N. Y.)* 387; *Mulvehall v. Millward*, 11 *N. Y.* 343; *Clark v. Fitch*, 2 *Wend. (N. Y.)* 459; *Kennedy v. Shea*, 110 *Mass.* 147; *Emery v. Gowen*, 4 *Greenl. (Me.)* 33; *Ellington v. Ellington*, 47 *Miss.* 329; *White v. Murtland*, 71 *Ill.* 250; *Hornketh v. Barr*, 8 *Serg. & R. (Pa.)* 36; *Logan v. Murray*, 6 *Serg. & R. (Pa.)* 175; *Mohry v. Hoffman*, 86 *Pa. St.* 358; *Boyd v. Byrd*, 8 *Blackf. (Ind.)* 113; *Bolton v. Miller*, 6 *Ind.* 266; *Mercer v. Walmsley*, 5 *Har. & J. (Md.)* 27; *Greenwood v. Greenwood*, 28 *Md.* 369, 382; *Hudkins v. Haskins*, 22 *W. Va.* 645.

¹³² In *Martin v. Payne*, *supra*, the plaintiff's daughter, who was under age, went, with the consent of her father, to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement that she should continue to live in his house for any

fact that the child has no intention to return cannot make any difference, for that cannot terminate the relationship of master and servant between the parent and the child. As was said by the New York court, the child's volition cannot affect the parent's rights.¹³³ This question has generally arisen in actions for the seduction or debauching of a daughter; but the doctrine is general, and must apply just as well where some other injury to a child is complained of. If the child, at the time of the injury, is bound out to service to another, the rule is different, for the parent then has no right to the child's services.¹³⁴ If the service

fixed time. While in her uncle's house she was seduced and got with child. Immediately afterwards she returned to her father's house, where she was maintained, and the expense of her lying in was paid by him. It was held, contrary to the English cases, that the father could maintain an action against the seducer. "In the present case," said the court, "the father had made no contract binding out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and, although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. She was his servant *de jure*, though not *de facto*, at the time of the injury; and, being his servant *de jure*, the defendant has done an act which has deprived the father of the daughter's services, and which he might have exacted but for that injury." In *Clark v. Fitch*, *supra*, it was proved upon the trial of a similar action that the plaintiff told his daughter that she might remain at home or go out to service, as she pleased, but, if she left his house, she must take care of herself, and he relinquished all claim to her wages and services. It was contended that there was a distinction between this case and that of *Martin v. Payne*, *supra*, on the ground that he had given her her time absolutely; but the court held that the personal rights of the father were not relinquished, and that he could recover; and, further, that it made no difference that he had been put to no expense. And in *Mulveball v. Millward*, *supra*, it appeared that the plaintiff's minor daughter, who had left his house to work for the defendant, was seduced by the latter while in his employ, and became pregnant. She thereafter worked at other places, and did not return to her father's house; nor did it appear that she had any intention to return there until after her confinement and the birth of her child. It was not shown that her father took any care of her, or expended any money on her account, during her pregnancy or sickness. It was held that, as the father had not surrendered his right to her services, he could maintain an action for her seduction.

¹³³ *Martin v. Payne*, *supra*.

¹³⁴ *Dain v. Wycoff*, 7 N. Y. 191; *Kennedy v. Shea*, 110 Mass. 150; *Ellington*

has terminated, however, and the child has returned home, or is on his way home, he is constructively in his parent's service, and, if injured before or after reaching home, the parent may recover.¹³⁵

If the child is so young at the time of the injury that it is incapable of performing any act of service, and it is cured before it reaches an age at which it can perform services, it is clear that there can be no recovery as for mere loss of service, for there has been and can be no loss of service, as the result of the injury. In *Hall v. Hollander*¹³⁶ the child was less than three years old when injured, and was cured within six months. The declaration sought to recover, among other damages, for loss of the child's services during that time. It was very properly held that there could be no recovery as for loss of services. In England the cases go further than this, and hold that, where the parent sues "*per quod servitium amisit*," he must show a loss of service at the time of the action, and cannot maintain an action solely for prospective loss of service. And it is therefore held that there can be no recovery for loss of services where the child, at the time of the action, is too young to perform any act of service, though the injury may be permanent, and it may be clear that there will be a loss of services in the future. There are decisions and dicta in this country to the same effect.¹³⁷ But, in most states where the question has arisen, the doctrine of the English courts is repudiated, and it is held that there may be a recovery for prospective loss of services, however young or inca-

v. Ellington, 47 Miss. 329; *Bolton v. Miller*, 6 Ind. 262. Even in England, however, it was held that where a man fraudulently procured a girl to enter his service, for the purpose of seducing her, and carried out his purpose, the parent might sue as if no hiring had taken place. *Speight v. Oliviera*, 2 Starkie, 493.

¹³⁵ *Terry v. Hutchinson*, L. R. 3 Q. B. 599 (a case of seduction of a daughter). And see *Emery v. Gowen*, 4 Greenl. (Me.) 33.

¹³⁶ 7 Dowl. & R. 133.

¹³⁷ See *Whitaker v. Warren*, 60 N. H. 20; *Shields v. Yonge*, 15 Ga. 349, 356; *Matthews v. Railway Co.*, 26 Mo. App. 75; *Dunn v. Railway Co.*, 21 Mo. App. 188.

pable of service the child may be at the time the action is brought.¹³⁸

Whether or not a parent can recover for expenses incurred in caring for his child independently of any loss of service is a question upon which the authorities are conflicting. In *Hall v. Hollander*,¹³⁹ which has already been referred to, a father brought an action for personal injury to his son by driving against him. The declaration alleged that, by means thereof, the son was sick during the space of six months, "during all which time the plaintiff lost and was deprived of the service of his said son and servant, and was also thereby forced and obliged to pay, lay out, and expend a large sum of money, in and about endeavoring to procure his said son and servant to be cured," etc. At the trial it appeared that the son was only 2½ years old, and there was no evidence that he was capable of performing any service for his father. It was therefore held that the action as brought could not be maintained. This case has often been cited as authority for the proposition that there can be no recovery for expenses incurred by a parent in caring for the injured child in the absence of the actual or constructive relation of master and servant, and loss of services. But the case does not go so far. The declaration expressly based the right to recover on the existence of the relationship of master and servant, and the evidence showed that the child was too young to perform any act of service. It was for this reason that the action failed. Bayley, J., said that he certainly was not prepared to say "that a declaration might not be framed, in which the father being averred to be under an obligation to maintain the child, and having no means of obtaining medical assistance, he necessarily incurred expense in and about his cure, so as to entitle him to recover." The later English cases, however, hold that there can be no recovery for such expenses unless there is an actual or constructive relationship of master and servant, and, therefore, that there can be no recov-

¹³⁸ *Finley v. Railroad Co.*, 59 Fed. 419; *Clark v. Bayer*, 32 Ohio St. 299; *Frick v. Railway Co.*, 75 Mo. 542; *Cuming v. Railroad Co.*, 109 N. Y. 95, 16 N. E. 65; *Netherland-American Steam Nav. Co. v. Hollander*, 8 C. C. A. 169, 59 Fed. 417.

¹³⁹ 7 Dowl. & R. 133.

ery even for medical and other expenses where the child is too young to render services.¹⁴⁰ There are cases in this country which recognize the same doctrine.¹⁴¹

These cases which deny to the parent any remedy for medical or other expenses incurred in consequence of the injury to the child, except as incident to the loss of service, ignore the parental relation and obligation as an independent ground of recovery, although it is clear that the parent has sustained a pecuniary loss as the proximate result of the wrong. In this country the prevailing doctrine is the other way, and in favor of allowing the parent to recover independently of any question as to loss of service. "The authorities in this country approve a more liberal and a more reasonable doctrine, and, basing the right of action upon the parental relation, instead of master and servant, allow the father to recover his consequential loss irrespective of the age of the minor."¹⁴² In *Dennis v. Clark*,¹⁴³ which is a leading case holding this doctrine, it was decided after careful consideration, and a review of the authorities, that, when an infant residing with his father receives such an injury as would give the child a right of action, the father, who is put to necessary expense in the care and cure of the child, may maintain an action for indemnity, though the child may be too young to render any service. This doctrine casts upon the wrongdoer responsibility for a pecuniary loss flowing proximately from his wrongful act, if actually sustained by the parent in the discharge of his parental obligation to care for and maintain his infant children, without regard to any consideration of loss of service.

It has been held in a late case in New York that the parent cannot recover for medical and surgical expenses, which, accord-

¹⁴⁰ *Grinnell v. Wells*, 8 Scott, N. R. 741.

¹⁴¹ *Whitaker v. Warren*, 60 N. H. 20; *Shields v. Yonge*, 15 Ga. 349, 356; *Matthews v. Railway Co.*, 26 Mo. App. 75; *Dunn v. Railway Co.*, 21 Mo. App. 188.

¹⁴² *Finley v. Railroad Co.*, 59 Fed. 419; *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Sykes v. Lawlor*, 49 Cal. 236; *Durden v. Barnett*, 7 Ala. 169; *Clark v. Bayer*, 32 Ohio St. 299; *Cuming v. Railroad Co.*, 109 N. Y. 95, 16 N. E. 65; *Netherland-American Steam Nav. Co. v. Hollander*, 8 C. C. A. 169, 59 Fed. 417.

¹⁴³ 2 Cush. (Mass.) 347.

ing to the testimony of experts, may become necessary in the future, though the child might be allowed to recover therefor.¹⁴⁴

Other Elements of Damage.

As will presently be seen, the courts have made a distinction, as regards the measure of damages, between actions by a parent for the seduction or debauching of his daughter and actions for other wrongs. In the former they not only allow the parent to recover for loss of his daughter's services, and for medical and other expenses incurred in caring for her, but they recognize, as the real gravamen of the action, the wounded feelings and mortification of the parent, the disgrace brought upon his family by the wrong, and the corrupting example to the other children, and allow the jury to take these matters into consideration in awarding the damages.¹⁴⁵ There are some cases in which this principle has been applied in an action for loss of service from other injuries than seduction. It has been held, for instance, that in an action per quod servitium amisit, brought by a parent for an assault and battery on his daughter, the jury, in assessing the damages, had a right to consider the injury to the parent's feelings, and to the character of the family.¹⁴⁶ In most states the rule is otherwise,¹⁴⁷ the recovery of such damages being limited to actions for the seduction or debauching of a daughter.

Remote and Proximate Cause.

The loss of service or expenses incurred by the parent must be the proximate result of the wrongful conduct of the defendant, or he cannot recover therefor. Thus, as will be seen in dealing with seduction, if the daughter loses her health, not as the direct result of the seduction, but because of mental suffering caused by her abandonment by the seducer, shame resulting from exposure, or other similar causes, and her loss of health results

¹⁴⁴ Cuming v. Railroad Co., supra.

¹⁴⁵ Post, p. 281.

¹⁴⁶ Trimble v. Spiller, 7 T. B. Mon. (Ky.) 394. And see Klingman v. Holmes, 54 Mo. 304; Magee v. Holland, 27 N. J. Law, 86.

¹⁴⁷ Cowden v. Wright, 24 Wend. (N. Y.) 429; Whitney v. Hitchcock, 4 Denio (N. Y.) 461.

in the loss of her services to her father, or in expenses to him, the seduction is not the proximate cause of the loss, and the father cannot maintain an action therefor.¹⁴⁸ The same principle applies in the case of other injuries.

Adult Children.

A parent may maintain an action for the loss of the services of an adult child if the relationship of master and servant exists between them. In such a case the relationship will not be implied, as in the case of a minor child, for there is no right to the services of an adult child from which to imply service. It must be shown that the relationship actually exists. The question has generally arisen in cases of seduction of an adult daughter, but the rule applies to other injuries also.¹⁴⁹

Who may Sue.

The action for loss of services caused by injury to a child is not necessarily always in the father. It is in the person entitled to the services of the child. If the father is entitled, then the action must be brought by him, and not by the mother or any other person.¹⁵⁰ If the mother is entitled to the child's services, either because of the father's death, or because of his desertion, leaving the child for her to support, she may sue.¹⁵¹ And the action may be maintained by any other person who stands in loco parentis.¹⁵²

¹⁴⁸ Post, p. 281.

¹⁴⁹ *Mercer v. Jackson*, 54 Ill. 397. As to seduction of daughter, see post, p. 278.

¹⁵⁰ *Vossell v. Cole*, 10 Mo. 634; *Furman v. Van Sise*, 56 N. Y. 435; *Sargent v. —*, 5 Cow. (N. Y.) 106; *Ryan v. Fralick*, 50 Mich. 483, 15 N. W. 561; *Jag. Torts*, 453.

¹⁵¹ *Bedford v. McKowl*, 3 Esp. 119; *Natchez, J. & C. R. Co. v. Cook*, 63 Miss. 38; *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157; *Harford Co. v. Hamilton*, 60 Md. 340; *Kennedy v. Railroad Co.*, 35 Hun (N. Y.) 187; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581; *Abrahams v. Kidney*, 104 Mass. 222; *Ellington v. Ellington*, 47 Miss. 329; *Davidson v. Abbott*, 52 Vt. 570; *Gray v. Durland*, 51 N. Y. 424; *Keller v. Donnelly*, 5 Md. 211. But see *South v. Denniston*, 2 Watts (Pa.) 474. See post, p. 283.

¹⁵² *Whitaker v. Warren*, 60 N. H. 20; *Clark v. Bayer*, 32 Ohio St. 299; *Fernsler v. Moyer*, 3 Watts & S. (Pa.) 416; *Irwin v. Dearman*, 11 East, 23; *Blanchard v. Ilsley*, 120 Mass. 487; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661; *Bartley v.*

Action for Death of Child.

In treating of husband and wife, attention was called to the rule, "*Actio personalis moritur cum persona*," and it was shown that, by the weight of authority, it was applied at common law so as to prevent an action by one spouse for a wrongful act or neglect causing the death of the other.¹⁵³ It was seen that if, by the tortious conduct of another, a wife was killed, her husband could not, at common law, recover for the loss of her society or services. It was also seen that this rule has been very generally changed by statute. The same is true in the case of parent and child, where the child is killed by the wrongful act or omission of another. Though there were some cases to the contrary,¹⁵⁴ by the weight of authority, at common law the parent could not recover for the loss of the child's services, nor for his expenses resulting from the wrong, where his death was immediate.¹⁵⁵ Under Lord Campbell's act,¹⁵⁶ however, and the similar statutes which have been enacted in this country, the rule is different; and, wherever a child's death is caused by the wrongful act or omission of another, his parent, or his executor or administrator, for the parent's benefit, may recover damages for past and prospective loss of the child's services. And it is well settled in this country that, when suit is brought under the statute, there may be a recovery for future loss of services, although the child was of such tender years as to be incapable of render-

Richtmyer, 4 N. Y. 38; Moritz v. Garnhart, 7 Watts (Pa.) 302; Manvell v. Thomson, 2 Car. & P. 303; Davidson v. Goodall, 18 N. H. 423; Keller v. Donnelly, 5 Md. 211; Ball v. Bruce, 21 Ill. 161; Maguinay v. Saudek, 5 Sneed (Tenn.) 146; Jag. Torts, 454, and cases there collected. See post, p. 283.

¹⁵³ Ante, p. 74; Tiff. Death Wrongf. Act, §§ 1-18.

¹⁵⁴ Ford v. Monroe, 20 Wend. (N. Y.) 210 (since overruled); Plummer v. Webb, 1 Ware, 69, Fed. Cas. No. 11,234; James v. Christy, 18 Mo. 162; Shields v. Yonge, 15 Ga. 349.

¹⁵⁵ Osborn v. Gillett, L. R. 8 Exch. 88 (Bramwell, B., dissenting); Skinner v. Railroad Corp., 1 Cush. (Mass.) 475; Nickerson v. Harriman, 38 Me. 277; Covington St. Ry. Co. v. Packer, 9 Bush (Ky.) 455; Edgar v. Castello, 14 S. C. 20; Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38; Sherman v. Johnson, 58 Vt. 40, 2 Atl. 707; Jackson v. Railway Co., 140 Ind. 241, 39 N. E. 663; Tiff. Death Wrongf. Act, § 11, and cases there cited.

¹⁵⁶ 9 & 10 Vict. c. 93.

ing services.¹⁵⁷ Even under the statutes, the damages are for loss of service, and their measure is the value of the services, past and prospective, less the probable cost of support and maintenance.¹⁵⁸ Beyond what the law will imply as between parent and child, no proof of service in fact is necessary in suing under the statute.¹⁵⁹

Furnishing Intoxicating Liquor to Child.

Perhaps, even at common law, a parent could maintain an action against a person for selling or furnishing his minor child with intoxicating liquors, whereby the parent sustains damage. At any rate, in many states such a right of action is given by statute, so that "where liquor is sold to a minor, whereby he becomes intoxicated, and he thereafter becomes sick in consequence thereof, and the father is deprived of his services and is compelled to expend money for medical attendance upon him, the father may maintain an action, under the civil damage law, to recover the damages occasioned thereby."¹⁶⁰

ACTION BY PARENT FOR SEDUCTION OR DEBAUCHING OF DAUGHTER.

134. On the seduction or debauching of his daughter, resulting actually or constructively in loss of service, the father, or any one standing in loco parentis, has a right of action against the wrongdoer for the loss of service and incidental expenses.

135. In such a case damages may also be given for all that the parent may suffer from the ruin of his daughter, the disgrace to his family, and the corrupting example to his other children.

¹⁵⁷ *Ihl v. Railway Co.*, 47 N. Y. 317; *Oldfield v. Railroad Co.*, 14 N. Y. 310; *Foppiano v. Baker*, 3 Mo. App. 560.

¹⁵⁸ *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Rajnowski v. Railroad Co.*, 74 Mich. 20, 41 N. W. 847; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85.

¹⁵⁹ *Duckworth v. Johnson*, 4 Hurl. & N. 653; *Condon v. Railway Co.*, 16 Ir. C. L. 415; *Ihl v. Railway Co.*, 47 N. Y. 317; *Little Rock & Ft. S. Ry. Co. v. Barker*, 39 Ark. 491; *City of Chicago v. Major*, 18 Ill. 349.

¹⁶⁰ *Black, Intox. Liq.* § 285. See *Id.* §§ 277-337.

136. The same rules apply here as in the case of other injuries, as to the necessity to show that the daughter was in the actual or constructive service of the plaintiff at the time of the injury.¹⁶¹ The necessity for loss of service has been dispensed with by statute in some states.

A parent's right to the services of his child gives him a right of action for damages arising from the seduction or debauching of his daughter.¹⁶² At common law the daughter's consent to the intercourse prevented her from maintaining an action for her seduction,¹⁶³ but her consent cannot affect her parent's rights, and is therefore no bar to his action for the loss of her services and other damages to him.

From the earliest period the courts have based the parent's right of action, not upon the seduction or debauching, but upon the loss of his daughter's services. The action cannot be maintained for the mere act of intercourse, though it is a far greater injury to the father than any mere pecuniary loss he may sustain. In *Eager v. Grimwood*¹⁶⁴ it appeared that the defendant had debauched the plaintiff's daughter, but that another, and not he, was the cause of her pregnancy; and it was therefore held that the plaintiff could not recover.

In its origin the action was very technical. If the wrongdoer came upon the father's premises and debauched the daughter

¹⁶¹ Ante, p. 269.

¹⁶² *Bennett v. Allcott*, 2 Term R. 167; *Woodward v. Walton*, 2 Bos. & P. (N. R.) 476; *Blagge v. Ilsley*, 127 Mass. 191; *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359; *Parker v. Meek*, 3 Sneed (Tenn.) 29; *Logan v. Murray*, 6 Serg. & R. (Pa.) 175; *Ellington v. Ellington*, 47 Miss. 329; *Mercer v. Walmsley*, 5 Har. & J. (Md.) 27; *Sargent v. —*, 5 Cow. (N. Y.) 109; *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459. If a marriage is fraudulently induced by a man who already has a wife living, the fraud vitiates the parent's consent, and an action may be maintained by him. *Lawyer v. Fritcher*, 130 N. Y. 239, 29 N. E. 267.

¹⁶³ *Paul v. Frazier*, 3 Mass. 71; *Woodward v. Anderson*, 9 Bush (Ky.) 624; *Jordan v. Hovey*, 72 Mo. 574; *Weaver v. Bachert*, 2 Pa. St. 80. Contra, by statute, post, p. 283.

¹⁶⁴ 1 Exch. 61.

there, the parent could maintain an action of trespass *quare clausum fregit*, and lay the loss of service and other damage sustained by reason of the intercourse as consequential upon and in aggravation of the trespass; or he could, at his election, bring an action on the case, ignoring the trespass. But for merely debauching a man's daughter, unaccompanied by an unauthorized entry upon his premises, the action had to be in case. And such is still the rule at common law.¹⁶⁵

When the action is for loss of service, there can, of course, be no recovery, unless the relationship of master and servant actually or constructively exists. And the cases go even further, and hold that no action at all can be maintained, even for medical and other expenses incurred in caring for the daughter, unless the relationship of master and servant exists either in fact or in contemplation of law.¹⁶⁶ As has been seen, however, in this country, where a minor child is injured by the wrongful conduct of another, and the parent incurs expense in caring for and curing the child, many courts base the parent's right of action for indemnity upon the parental relation and obligation to maintain the child, instead of on the relation of master and servant, and allow a recovery irrespective of the loss of service.¹⁶⁷ There is no good reason why the doctrine of these cases should not be applied to cases in which the wrong is the debauching of a daughter.

It is not necessary in this action, any more than in an action for other injuries to a child, to show the actual performance of services by a minor child. It is sufficient to show that the parent has a right to the daughter's services, if she is a minor, and service will be implied.¹⁶⁹ It has been already shown in a pre-

¹⁶⁵ *Mercer v. Walmsley*, 5 Har. & J. (Md.) 27. And cases cited in note 162, *supra*.

¹⁶⁶ *Grinnell v. Wells*, 7 Man. & G. 1033; *Harris v. Butler*, 2 Mees. & W. 539; *Abrahams v. Kidney*, 104 Mass. 222; *Bartley v. Richtmyer*, 4 N. Y. 38; *Coon v. Moffitt*, 3 N. J. Law, 583; *White v. Murtland*, 71 Ill. 252; *Vossell v. Cole*, 10 Mo. 634.

¹⁶⁷ *Ante*, p. 273.

¹⁶⁹ *Maunder v. Venn*, *Moody & M.* 323; *Manvell v. Thomson*, 2 Car. & P. 303; *Herring v. Jester*, 2 *Houst. (Del.)* 66; *Parker v. Meek*, 3 *Sneed (Tenn.)*

ceding section when the relationship of master and servant is deemed to exist between parent and minor child, and it is only necessary to refer to what was there said. The rules are equally applicable here.¹⁷⁰

The courts have made a distinction, as regards the measure of damages, between actions by a parent for the seduction or debauching of his daughter and actions for other wrongs. The fiction of loss of service is generally upheld even in cases of seduction; but the courts recognize as the real gravamen of the action the wounded feelings and mortification of the parent, the disgrace brought upon his family by the wrong, and the corrupting example to the other children, and allow the jury to take these matters into consideration in awarding damages.¹⁷¹ As was said by Lord Eldon: "In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to her child. In such case I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort, as well as the service, of her daughter, in whose virtue she can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example."¹⁷²

As stated in treating generally of a parent's right of action for injuries to his child, the loss of services or expenses must be the proximate result of the defendant's wrong, or the parent cannot

29; *Emery v. Gowen*, 4 Greenl. (Me.) 33; *Mercer v. Walmsley*, 5 Har. & J. (Md.) 27; *Kennedy v. Shea*, 110 Mass. 147; *White v. Murtland*, 71 Ill. 250.

¹⁷⁰ Ante, p. 270, where the cases on seduction as well as on other injuries are collected, and the conflicts shown.

¹⁷¹ *Blagge v. Ilsey*, 127 Mass. 191; *Bedford v. McKowl*, 3 Esp. 119; *Irwin v. Dearman*, 11 East, 23; *Barbour v. Stephenson*, 32 Fed. 66; *Clem v. Holmes*, 33 Grat. (Va.) 722; *Rollins v. Chalmers*, 51 Vt. 592; *Garretson v. Becker*, 52 Ill. App. 255; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Felkner v. Scarlet*, 29 Ind. 154; *Phelin v. Kenderdine*, 20 Pa. St. 354; *Hudkins v. Haskins*, 22 W. Va. 645; *Klopfer v. Bromme*, 26 Wis. 372; *Dain v. Wyckoff*, 18 N. Y. 45; *Hatch v. Fuller*, 131 Mass. 574; *Parker v. Monteith*, 7 Or. 277; *Emery v. Gowen*, 4 Greenl. (Me.) 33.

¹⁷² *Bedford v. McKowl*, supra.

recover. The principle applies to actions by a parent for the seduction or debauching of his daughter. If the daughter, for instance, loses her health, not as the direct result of the seduction, but because of mental suffering caused by her abandonment by the seducer, shame resulting from exposure, or other similar causes, and her illhealth results in the loss of her services to her father, or in medical or other expenses, the loss to the father is too remote a consequence of the seduction, and he cannot maintain an action.¹⁷³ If, however, mental distress or disease is the proximate result of the intercourse, as where it is accomplished under circumstances of violence or fraud, and impairment of health, and consequent expense or loss of service to the father follow, the father may maintain an action. It is not necessary that the intercourse shall have resulted in pregnancy or sexual disease.¹⁷⁴ Loss sustained in consequence of a venereal disease caused by the intercourse is not too remote.¹⁷⁵

A parent may maintain an action for loss of the services of an adult child, if the relationship of master and servant exists between them. Under such circumstances an action will lie for seducing or debauching an adult daughter, and thereby causing a loss of services; and the recovery may, as in the case of a minor daughter, include damages for wounded feelings, mortification, etc.¹⁷⁶ In the case of an adult child, however, the relationship of master and servant will not be implied, as in the case of a minor child, but it must be shown that the relation actually existed.¹⁷⁷

¹⁷³ *Boyle v. Brandon*, 13 Mees. & W. 738; *Knight v. Wilcox*, 14 N. Y. 413.

¹⁷⁴ *Abrahams v. Kidney*, 104 Mass. 222; *Van Horn v. Freeman*, 6 N. J. Law, 322; *Manvell v. Thomson*, 2 Car. & P. 303; *Blagge v. Ilsley*, 127 Mass. 191; *Briggs v. Evans*, 5 Ired. (N. C.) 16.

¹⁷⁵ *White v. Nellis*, 31 N. Y. 405.

¹⁷⁶ *Bennett v. Allcott*, 2 Term R. 166; *Davidson v. Abbott*, 52 Vt. 570; *Herring v. Jester*, 2 Houst. (Del.) 66; *Sutton v. Huffman*, 32 N. J. Law, 58; *Bayles v. Burgard*, 48 Ill. App. 371; *Mercer v. Walmsley*, 5 Har. & J. (Md.) 27; *Lee v. Hodges*, 13 Grat. (Va.) 726; *Vossel v. Cole*, 10 Mo. 634; *Nickleson v. Stryker*, 10 Johns. (N. Y.) 115; *Millar v. Thompson*, 1 Wend. (N. Y.) 447; *Patterson v. Thompson*, 24 Ark. 55; *Briggs v. Evans*, 5 Ired. (N. C.) 21; *Hartman v. McCrary*, 59 Mo. App. 571.

¹⁷⁷ *Harper v. Luffkin*, 7 Barn. & C. 387; *Bartley v. Richtmyer*, 4 N. Y. 38; *Parker v. Meek*, 3 Sneed (Tenn.) 29; *Nickleson v. Stryker*, 10 Johns. (N. Y.) 115; and cases cited in note 149, *supra*.

Proof of any actual service, however slight, has been held sufficient.¹⁷⁸ And it has been held that service may be presumed where an adult daughter continues to live with her father.¹⁷⁹

The right to maintain an action for the seduction or debauching of a child is not necessarily limited to the father. He must sue if entitled to the child's services. On his death or desertion, the action may be maintained by the mother.¹⁸⁰ And, generally, an action will lie by any person who stands in loco parentis, and is therefore entitled to the child's services.¹⁸¹

Statutory Actions for Seduction.

By statute, in some states, the fiction of loss of service to sustain an action by a parent for the seduction or debauching of his daughter has been abolished, and the parent can recover without showing loss of service.¹⁸² Her consent, as has been seen, pre-

¹⁷⁸ Cases cited above. And see *Wallace v. Clark*, 2 Overt. (Tenn.) 93.

¹⁷⁹ See *Sutton v. Huffman*, 32 N. J. Law, 58; *Brown v. Ramsay*, 29 N. J. Law, 118; *Briggs v. Evans*, 5 Ired. (N. C.) 21; *Wilhoit v. Hancock*, 5 Bush (Ky.) 567. See *Hartman v. McCrary*, 59 Mo. App. 571.

¹⁸⁰ Ante, p. 276; *Bedford v. McKowl*, 3 Esp. 119; *Furman v. Van Sise*, 56 N. Y. 435; *Heaps v. Dunham*, 95 Ill. 583; *Abrahams v. Kidney*, 104 Mass. 222; *Ellington v. Ellington*, 47 Miss. 329; *Davidson v. Abbott*, 52 Vt. 570; *Gray v. Durland*, 50 Barb. (N. Y.) 100; *Id.*, 51 N. Y. 424; *Keller v. Donnelly*, 5 Md. 211; *Coon v. Moffitt*, 3 N. J. Law, 583; *Hammond v. Corbett*, 50 N. H. 501; *Matthewson v. Perry*, 37 Conn. 435. But see *South v. Denniston*, 2 Watts (Pa.) 474. In *Coon v. Moffitt*, 3 N. J. Law, 583, it was held that an action might be maintained by the mother for the seduction of her daughter during the father's lifetime, and while the daughter was in the constructive service of her father, where the mother, after the father's death, supported and cared for the daughter, paid her lying-in expenses, and became entitled to and lost her services; the loss of services being considered the gist of the action. And see *Parker v. Meek*, 3 Sneed (Tenn.) 29. But see, contra, *Logan v. Murray*, 6 Serg. & R. (Pa.) 175; *Vossell v. Cole*, 10 Mo. 634.

¹⁸¹ Ante, p. 276; *Irwin v. Dearman*, 11 East, 23; *Manvell v. Thomson*, 2 Car. & P. 303; *Davidson v. Goodall*, 18 N. H. 423; *Keller v. Donnelly*, 5 Md. 211; *Ball v. Bruce*, 21 Ill. 161; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661. But see *Bartley v. Richtmyer*, 4 N. Y. 38.

¹⁸² *Schmit v. Mitchell* (Minn.) 61 N. W. 140. In *Schmit v. Mitchell*, supra, it was held that the action will lie under the statute, where the father's home is in fact the daughter's home, though she is of age and employed elsewhere, but not where she is for no purpose a member of his family. In *Patterson*

vented a daughter from maintaining an action at common law for her seduction;¹⁸³ but in some states a right of action has been given her by statute. This, however, is a question not within our subject, as it has nothing to do with the relation of parent and child.

ACTION BY PARENT FOR ABDUCTING, ENTICING, OR HARBORING CHILD.

137. A parent, or any one standing in loco parentis, has a right of action for loss of services and incidental expenses against one who abducts or wrongfully entices or harbors his child.

138. The same rules apply here as in the case of other injuries, as to the necessity to show the actual or constructive relationship of master and servant.¹⁸⁴

The right of a parent to the custody and services of his minor children gives him a right of action against any one who abducts or designedly entices his child away from him, or who harbors the child, knowing that it has wrongfully left its home.¹⁸⁵ The parent may sue either in assumpsit or in tort.¹⁸⁶ The action in assumpsit is on the theory that the defendant has impliedly

v. Hayden, 17 Or. 238, 21 Pac. 129, it was held that, under such a statute, the seduction was the gist of the action; and, therefore, that an action would not lie against a man for having intercourse with a woman of easy virtue, without any seduction. In *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696, however, it was held that such lack of virtue goes in mitigation of damages only.

¹⁸³ Ante, p. 279.

¹⁸⁴ Ante, p. 269.

¹⁸⁵ *Evans v. Walton*, L. R. 2 C. P. 615; *Everett v. Sherfey*, 1 Iowa, 356; *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Caughey v. Smith*, 50 Barb. (N. Y.) 351; *Moritz v. Garnhart*, 7 Watts (Pa.) 302; *Grand Rapids & I. R. Co. v. Showers*, 71 Ind. 451; *Thompson v. Howard*, 31 Mich. 309; *Vaughan v. Rhodes*, 2 McCord (S. C.) 227; *Magee v. Holland*, 27 N. J. Law, 86; *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11,233; *Sargent v. Mathewson*, 38 N. H. 54. See *Loomis v. Deets* (Md.) 30 Atl. 612.

¹⁸⁶ *Thompson v. Howard*, 31 Mich. 309.

undertaken to pay for the services of the child.¹⁸⁷ The action in tort is the ordinary action of trespass on the case for the wrong and the consequent loss of the child's services.¹⁸⁸ It has also been held that an action will lie in trespass *vi et armis*, for the loss of the child's society, without any allegation of loss of service.¹⁸⁹ The intent of a person harboring a child who has run away from home is material. The employment, in good faith, of a runaway child, without knowledge that he has left his home wrongfully, is not a wrong.¹⁹⁰

In an action for abducting, enticing, or harboring, the recovery may include the expense to which the plaintiff has been put in regaining the custody of the child.¹⁹¹ In such an action as this, the gist of the action is the loss of the child's services, and the relation of master and servant, actual or constructive, between the plaintiff and the child, must be shown.¹⁹² A father, for instance, cannot maintain an action for enticing away his son, whom he has suffered to remain under the custody of his mother, from whom he (the father) is separated, and to be supported and employed by her.¹⁹³ The rules as to constructive service are the same in these as in other cases.¹⁹⁴

¹⁸⁷ *Thompson v. Howard*, 31 Mich. 309.

¹⁸⁸ *Evans v. Walton*, *supra*; *Jones v. Tevis*, 4 Litt. (Ky.) 25; *Sargent v. Mathewson*, 38 N. H. 54; *Noice v. Brown*, 39 N. J. Law, 569.

¹⁸⁹ *Kirkpatrick v. Lockhart*, 2 Brev. (S. C.) 276; *Vaughan v. Rhodes*, 2 McCord (S. C.) 227. And see 3 Bl. Comm. 140. But see *Jones v. Tevis*, 4 Litt. (Ky.) 25.

¹⁹⁰ *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Caughey v. Smith*, 47 N. Y. 244; *Sargent v. Mathewson*, 38 N. H. 54.

¹⁹¹ *Magee v. Holland*, 27 N. J. Law, 86.

¹⁹² *Magee v. Holland*, *supra*; *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Wodell v. Coggeshall*, 2 Metc. (Mass.) 89.

¹⁹³ *Wodell v. Coggeshall*, *supra*.

¹⁹⁴ *Ante*, p. 279.

PARENT'S RIGHTS IN CHILD'S PROPERTY.**139. Apart from his child's earnings a parent, as such, has no rights in property acquired by his child.**

Whatever property a child may acquire in any manner, except as compensation for services rendered by him, belongs to him absolutely, and the parent, as such, has no claim to it.¹⁹⁵ "He has no title to the property of the child, nor is the capacity or right of the latter to take property or receive money by grant, gift, or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child, or as against third persons who claim title or possession from or under the infant."¹⁹⁶ It follows from this that one who pays money belonging to a child to his parent does so at his own risk, and will not be protected by the parent's discharge.¹⁹⁷ Where a child has not been emancipated, but is supported by his parent, his services, as we have seen, belong to the parent. His earnings from services rendered for another, without a gift of them to him by the parent, stand on the same footing, and belong to the parent. And so it is with property purchased with his earnings.¹⁹⁸ What is given to a child by his parent in the way of support and maintenance, and for purposes of education, as clothing, school books, etc., belongs to the parent, and he may reclaim it, or recover damages for its injury.¹⁹⁹ But what is given, not in the

¹⁹⁵ *Banks v. Conant*, 14 Allen (Mass.) 497; *Keeler v. Fassett*, 21 Vt. 539; *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Rhoades v. McNulty*, 52 Mo. App. 301.

¹⁹⁶ *Banks v. Conant*, *supra*.

¹⁹⁷ *Dagley v. Tolferry*, 1 P. Wms. 285; *Perry v. Carmichael*, 95 Ill. 519; *Clark v. Smith*, 13 S. C. 585; *Linton v. Walker*, 8 Fla. 144; *Brown v. State*, 42 Ala. 540.

¹⁹⁸ *Ante*, p. 255.

¹⁹⁹ *Dickinson v. Winchester*, 4 Cush. (Mass.) 114; *Parmelee v. Smith*, 21 Ill. 620; *Prentice v. Decker*, 49 Barb. (N. Y.) 21.

way of support and maintenance, but with the intention that it shall become the property of the child, will become his.²⁰⁰ And this is true of a gift of his earnings.²⁰¹

GIFTS, CONVEYANCES, AND CONTRACTS BETWEEN PARENT AND CHILD.

140. Gifts, conveyances, and contracts between parent and child are as valid as if between strangers.

But—

(a) A gift or conveyance from child to parent, or a contract beneficial to the parent, is presumed to have been made under parental influence, and to be voidable by the child, if made before or shortly after attaining his majority; and the parent must show that there was no undue influence.

(b) Gifts, conveyances, and contracts by a minor child are voidable at his option, on the ground of infancy.

A gift from a parent to his child, accompanied by delivery, is as valid as a gift between strangers.²⁰² Delivery of a gift from a father to his child, when the property remains in the family, is often difficult to prove; but, when the gift is in fact shown to have been fully executed by delivery,²⁰³ it will be upheld. A child may likewise make a valid gift to its parent, if the gift is not tainted with undue parental influence.²⁰⁴ The same is true of conveyances between parent and child.²⁰⁵ And it is also true of contracts be-

²⁰⁰ *Wheeler v. Railway Co.*, 31 Kan. 640, 3 Pac. 297; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293; *Dickinson v. Winchester*, 4 Cush. (Mass.) 114.

²⁰¹ *Morse v. Welton*, 6 Conn. 547; ante, p. 255. As to gift of earnings as against creditors, see ante, p. 264.

²⁰² *May v. May*, 33 Beav. 81, 87; *Sanborn v. Goodhue*, 28 N. H. 48; *Kellogg v. Adams*, 51 Wis. 138, 8 N. W. 115; *Dodd v. McCraw*, 8 Ark. 84; *Danley v. Rector*, 10 Ark. 211; *Martrick v. Linfield*, 21 Pick. (Mass.) 325; *Kerrigan v. Rautigan*, 43 Conn. 17; *Pierson v. Heisey*, 19 Iowa, 114; *Hillebrant v. Brewer*, 6 Tex. 45; *Sims v. Sims*, 8 Port. (Ala.) 449.

²⁰³ See cases above cited.

²⁰⁴ Note 208, *infra*.

²⁰⁵ *Taylor v. Staples*, 8 R. I. 170.

tween them. The relationship of parent and child imposes no disability upon the parties to contract with each other. Their contracts, in the absence of undue influence by the parent, are just as valid as contracts between strangers.²⁰⁶

As will be seen in a subsequent chapter, an infant is not bound by his contracts, gifts, or conveyances if he chooses to avoid them on attaining his majority; but the other party, being an adult, is bound if the infant elects to hold him.²⁰⁷ The principles governing contracts and conveyances by infants must apply to contracts and conveyances between a parent and his minor child.

Because of the parental relation, and the opportunity it affords for the exercise of undue influence by the parent over the child, a contract between parent and child, beneficial to the parent, or a gift or conveyance by a child to his parent, made before or shortly after the child has attained his majority, will be presumed to have been the result of undue influence by the parent, and may be avoided by the child, unless the parent shows that no undue influence was exercised, and that the child acted freely and with a full knowledge of all material facts.²⁰⁸ The presumption of undue influence from parental relations does not cease as soon as the child becomes of age. It continues until there is such a complete emancipation that the judgment of the child is under no control. In *Bergen v. Udall*,²⁰⁹ a daughter, soon after reaching her majority, made a voluntary conveyance for the benefit of her father. "A transaction like the present," said the court, "will be examined by the court with the most jealous scrutiny and suspicion. The person relying upon it must show affirmatively, not only that the person who made it understood its nature and effect, and executed it voluntarily, but that such will and inten-

²⁰⁶ *Abbott v. Converse*, 4 Allen (Mass.) 530; *Hall v. Hall*, 44 N. H. 293; *Steel v. Steel*, 12 Pa. St. 64.

²⁰⁷ Post, p. 360.

²⁰⁸ *Clark*, Cont. 367, and cases there cited; *Wright v. Vanderplank*, 8 De Gex, M. & G. 133; *Archer v. Hudson*, 7 Beav. 551; *Hoghton v. Hoghton*, 15 Beav. 278; *Savery v. King*, 5 H. L. Cas. 627; *Miller v. Simonds*, 72 Mo. 669; *Bergen v. Udall*, 31 Barb. (N. Y.) 9; *Taylor v. Taylor*, 8 How. 183; *Berkmeyer v. Kellerman*, 32 Ohio St. 239.

²⁰⁹ 31 Barb. (N. Y.) 9.

tion was not in any degree the result of misrepresentation or mistake, and was not induced by the exertion, for selfish purposes, and for his own exclusive benefit, of the influence and control which he possessed as a father over his daughter."

It has already been seen that a parent may relinquish his right to the services of his minor child, and that he may bind himself by an agreement to compensate the child for his services.²¹⁰ Because of the relationship, however, there is a presumption that no compensation was intended; and the child must show affirmatively that there was an agreement for compensation.²¹¹ The same is true where a child who has attained his majority continues to live with his parents, and to render services as during his minority. The presumption is that the services were intended to be gratuitous, and the burden is on the child to show that both parties intended that compensation should be made.²¹² A like rule applies where a parent seeks to recover as on a contract with a child for support or maintenance.²¹³

ADVANCEMENTS.

141. Gifts of real or personal property from parent to child, in anticipation of the child's share of the parent's estate under the statutes of distribution, are known as "advancements."
142. The expenses of maintenance and education, and inconsiderable gifts, are not advancements; but it is *prima facie* otherwise with gifts made to start a child in business or a profession, or to make a provision for him, and other substantial gifts.

²¹⁰ Ante, p. 258, and cases there cited.

²¹¹ Clark, Cont. 28, and cases there cited; Bantz v. Bantz, 52 Md. 693; Hefron v. Brown, 155 Ill. 322, 40 N. E. 583; Faloan v. McIntyre, 118 Ill. 292, 8 N. E. 315; Miller v. Miller, 16 Ill. 296.

²¹² Clark, Cont. 28; Dye v. Kerr, 15 Barb. (N. Y.) 444; Pellage v. Pellage, 32 Wis. 136; Mosteller's Appeal, 30 Pa. St. 473; Fitch v. Peckham, 16 Vt. 150; Young v. Herman, 97 N. C. 280, 1 S. E. 792; Freeman v. Freeman, 65 Ill. 106; Hall v. Hall, 44 N. H. 293.

²¹³ See Clark, Cont. 28.

When a parent makes a gift to any of his children, either out of his real or his personal estate, in anticipation of the child's share of his estate, the gift is known as an advancement, and will be taken into consideration in the distribution of the estate in case of intestacy.²¹⁴ The doctrine of advancement applies in the case of the distribution of intestate estates, under the statute of distribution in England (22 & 23 Car. II. c. 10),²¹⁵ and under similar statutes in the various states of this country.²¹⁶

Not every gift from parent to child will be considered as an advancement. Payments made for the ordinary expenses of maintenance and education are not advancements, nor are gifts of money for current expenses, or inconsiderable presents.²¹⁷ But payments made to enable a child to enter a profession, or to start him in business, are *prima facie* deemed advancements, such as the admission fee to one of the inns of court, the cost of a commission in the army, or the purchase of the good will and stock in trade of a business.²¹⁸ And in all other cases, when substantial payments of money have been made to a child, or he has received real or personal property of considerable value, the presumption is that they have been given him by way of advancements. "If, in the absence of evidence, you find a father giving a large sum in one payment, there is a presumption that that is intended to start him in life, or make a provision for him."²¹⁹

²¹⁴ Abb. Desc. Wills & Adm. 10, 138; 4 Kent, Comm. 417, 418; Grattan v. Grattan, 18 Ill. 167; Wallace v. Reddick, 119 Ill. 151, 8 N. E. 801; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256; Murphy v. Murphy (Iowa) 63 N. W. 697.

²¹⁵ Edwards v. Freeman, 2 P. Wms. 435; Walton v. Walton, 14 Ves. 318.

²¹⁶ Marshall v. Rench, 3 Del. Ch. 239; Huggins v. Huggins, 71 Ga. 66; Beebe v. Estabrook, 79 N. Y. 246; Grattan v. Grattan, 18 Ill. 167.

²¹⁷ Taylor v. Taylor, L. R. 20 Eq. 155; Cooner v. May, 3 Strob. Eq. (S. C.) 185; Riddle's Estate, 19 Pa. St. 431; Bradsher v. Cannady, 76 N. C. 445; Bowles v. Winchester, 13 Bush. (Ky.) 1; Elliot v. Collier, 1 Ves. Sr. 16; Sanford v. v. Sanford, 61 Barb. (N. Y.) 293; Mitchell v. Mitchell's Adm'r, 8 Ala. 414; King's Estate, 6 Whart. (Pa.) 370; Meadows v. Meadows, 11 Ired. (N. C.) 148.

²¹⁸ Taylor v. Taylor, L. R. 20 Eq. 155; Boyd v. Boyd, L. R. 4 Eq. 305; Bruce v. Griscom, 9 Hun (N. Y.) 280; Ison v. Ison, 5 Rich. Eq. (S. C.) 15; McCaw v. Blewit, 2 McCord, Eq. (S. C.) 90; Shiver v. Brock, 2 Jones, Eq. (N. C.) 137.

²¹⁹ Taylor v. Taylor, L. R. 20 Eq. 155. And see Sanford v. Sanford, 61 Barb. (N. Y.) 293; Graves v. Spedden, 46 Md. 527; Gordon v. Barkelew, 6 N. J. Eq. 94; Hatch v. Straight, 3 Conn. 31; Hodgson v. Macy, 8 Ind. 121; Taylor

DUTY OF CHILD TO SUPPORT PARENTS.

143. A child is under no legal obligation to support his parents, unless the duty is imposed by statute.

A child is under no legal obligation at common law to support his parents, even though they are destitute and infirm. There is a strong moral obligation, but no such duty is recognized by the law, unless, as is the case in some jurisdictions, the duty is expressly imposed by statute. While they are entitled to the child's wages during its minority, the relation which the child bears to them imposes no legal duty of maintenance, and no promise on the part of the child to pay even for necessities furnished them will be implied.²²⁰

v. Taylor, 4 Gilm. (Ill.) 303; Maxwell v. Maxwell, 109 Ill. 588; Sampson v. Sampson, 4 Serg. & R. (Pa.) 329; Watkins v. Young, 31 Grat. (Va.) 84; Murphy v. Murphy (Iowa) 63 N. W. 697; Phillips v. Phillips, 90 Iowa, 541, 58 N. W. 879; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482; Culp v. Wilson, 133 Ind. 294, 32 N. E. 928; New v. New, 127 Ind. 576, 27 N. E. 154; Reynolds' Adm'r v. Reynolds, 92 Ky. 556, 18 S. W. 517; McClanahan v. McClanahan, 36 W. Va. 34, 14 S. E. 419; Kemp v. Cossart, 47 Ark. 62, 14 S. W. 465. Insurance by a father on his life in the name of a son was held an advancement in *Cazassa v. Cazassa*, 92 Tenn. 573, 22 S. W. 560. Of course, the presumption may always be rebutted by showing that a gift or payment for services was intended, or that other consideration was given by the child. See *Hattersley v. Bissett* (N. J. Err. & App.) 29 Atl. 187; *Beakhust v. Crumby* (R. I.) 30 Atl. 453, 31 Atl. 753; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Groom v. Thompson* (Ky.) 16 S. W. 369; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796.

²²⁰ *Rex v. Munden*, 1 Strange, 190; *Lebanon v. Griffin*, 45 N. H. 558; *Edwards v. Davis*, 16 Johns. (N. Y.) 281; *Becker v. Gibson*, 70 Ind. 239; *Stone v. Stone*, 32 Conn. 142. In some states it is made the duty of children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability. Generally, a mode of enforcing such liability is prescribed by the statute. If no mode is provided, one who maintains a person within the terms of the statute, whose son, though able, neglected and refused to maintain him, may recover therefor from the son. *McCook Co. v. Kammos* (S. D.) 64 N. W. 1123; *Howe v. Hyde*, 88 Mich. 91, 50 N. W. 102.

DOMICILE OF CHILD.

144. The child's domicile of origin is determined by the domicile of the father. The child's domicile changes with the father's, or with the mother's, if a widow, unless she remarries.

The domicile of a legitimate child is originally that of its father, and, where the parent changes his domicile, the child's domicile changes with it.²²¹ The mother's domicile acquired after her husband's death determines that of the child,²²² but the child's domicile will not follow the mother's in case of her remarriage, but continues to be the same as it was on the death of the father.²²³ An infant, not being *sui juris*, cannot acquire a domicile of his own,²²⁴ though, for the purpose of obtaining a settlement, a pauper, after emancipation, has been held capable of acquiring an independent domicile.²²⁵

²²¹ *Somerville v. Somerville*, 5 Ves. 750; *Sharpe v. Crispin*, L. R. 1 Prob. & Div. 611; *Taylor v. Jeter*, 33 Ga. 195; *Daniel v. Hill*, 52 Ala. 430. As to domicile of bastard, see ante, p. 226.

²²² *Potinger v. Wightman*, 3 Mer. 67; *Johnstone v. Beattie*, 10 Clark. & F. 42; *Lamar v. Micou*, 112 U. S. 452, 470, 5 Sup. Ct. 221; *Ryall v. Kennedy*, 40 N. Y. Super. Ct. 347; *Carlisle v. Tuttle*, 30 Ala. 613.

²²³ *Cumner Parish v. Milton Parish*, 3 Salk. 259; *Potinger v. Wightman*, supra; *Lamar v. Micou*, supra; *Brown v. Lynch*, 2 Bradf. Sur. (N. Y.) 214; *Johnson v. Copeland's Adm'r*, 35 Ala. 521; *Inhabitants of Freetown v. Inhabitants of Taunton*, 16 Mass. 52.

²²⁴ *Somerville v. Somerville*, supra; *Brown v. Lynch*, supra; *Lacy v. Williams*, 27 Mo. 280; *Taylor v. Jeter*, 33 Ga. 195.

²²⁵ *Inhabitants of Charleston v. Inhabitants of Boston*, 13 Mass. 469; *Overseers of Washington v. Overseers of Beaver*, 3 Watts & S. (Pa.) 548; *Inhabitants of Dennyville v. Inhabitants of Trescott*, 30 Me. 470.

PART III.

GUARDIAN AND WARD.

CHAPTER XI.

GUARDIANS DEFINED—SELECTION AND APPOINTMENT.

- 145-146. In General.
- 147. Natural Guardians.
- 148. Guardians in Socage.
- 149. Testamentary Guardians.
- 150. Chancery Guardians.
- 151. Statute Guardians.
- 152. Quasi Guardians, or Guardians by Estoppel.
- 153. Guardians of Persons Non Compotes Mentis.
- 154. Guardians ad Litem.
- 155-157. Selection and Appointment of Guardians by Court.
- 158. Jurisdiction to Appoint Guardian.

IN GENERAL.

145. A guardian is one to whom the law intrusts the persons or estates, or both, of those who, by reason of their infancy or of mental infirmities, are not sui juris. Persons under guardianship are called "wards."

146. The various kinds of guardians are

- (a) Natural guardians.
- (b) Guardians in socage.
- (c) Testamentary guardians.
- (d) Chancery guardians.
- (e) Statute guardians.
- (f) Quasi guardians or guardians by estoppel.
- (g) Guardians of persons non compotes mentis or spendthrifts.
- (h) Guardians ad litem.

Guardians are divided into guardians of the person, called in the civil law "tutors," and guardians of the estate, called in the civil law "curators." These civil-law terms are in use in Louisiana. A guardian of the person is one who is lawfully invested with the care

of the person of the ward. A guardian of the estate is one who has been lawfully invested with the power of taking care of and managing the estate of an infant. Guardians may also be divided as stated in the black letter. Some of them have charge of the person of the ward only, while others have charge of his estate only, and others have charge both of the person and estate. A guardian *ad litem*, as will be seen, is a guardian merely for the purpose of a suit.

NATURAL GUARDIANS.

147. The father, or, if he is dead, the mother, or, if both are dead, the next of kin, is the natural guardian of a child. A natural guardian is a guardian of the ward's person only.

At common law there was what was known as a "guardian by nature." This guardianship related only to the person of the heir apparent, and vested first in the father, and then in the mother. It is now obsolete.¹ There was also a guardianship for nurture, which related to the person, but applied only to the younger children.² These two forms of guardianship are now replaced by the natural guardianship of the parent, or next of kin, if the parents are dead. The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature.³ On the death of the father, guardianship by nature passes to the mother, and, on her death, to the grandfather or grandmother or any other person who is next of kin.⁴ *Prima facie*, the natural guardian is entitled to the custody of the child; but there are exceptions to the rule, resulting from the doctrine that the child's welfare must be considered in awarding his custody. This question has been fully explained in treating of the relation of parent and child.⁵ The natural guardian of a child has control of his per-

¹ Macph. Inf. 57; 2 Kent, Comm. 221.

² Macph. Inf. 60; 2 Kent, Comm. 221.

³ *Ex parte Hopkins*, 3 P. Wms. 152.

⁴ *Harg. Co. Litt.* 88b, note 12; *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857; *In re Benton (Iowa)* 60 N. W. 614; *Darden v. Wyatt*, 15 Ga. 414.

⁵ *Ante*, p. 295.

son only. He has no authority or responsibility, as such, in regard to the child's property.⁶

GUARDIANS IN SOCAGE.

148. Guardianship in socage was where an infant acquired by descent land held in socage. The next of kin who could not possibly inherit became guardian, and had authority over the person of the infant as well as the land, and over personal property connected with it, but not over other personalty. On reaching the age of 14, the infant could elect his own guardian, and terminate the guardianship. This kind of guardianship is obsolete at common law, but there is a similar guardianship by statute in some jurisdictions.

"At the common law, if lands held in socage came to an infant by descent, his nearest relative who could not by any possibility inherit the lands was his guardian in socage until the age of fourteen, and until the infant selected a guardian for himself. Such guardian might lawfully receive the rents and profits of the land during the continuance of the guardianship. If the lands descended from the father or other paternal relatives, the mother, or next of kin on the part of the mother, was the guardian; and, if the lands descended on the part of the mother, the father, or next of kin on the paternal side, was entitled to the guardianship."⁷ It has been held that there could be no guardianship in socage where the infant acquired the lands by purchase, and not by descent.⁸

⁶ 2 Kent, Comm. 220; Hyde v. Stone, 7 Wend. (N. Y.) 354; Kline v. Beebe, 6 Conn. 494; Perry v. Carmichael, 95 Ill. 519; Kendall v. Miller, 9 Cal. 591; Otto v. Schlappkahl, 57 Iowa, 226, 10 N. W. 651; Alston v. Alston, 34 Ala. 15; Linton v. Walker, 8 Fla. 144; May v. Calder, 2 Mass. 55; Miles v. Boyden, 3 Pick. (Mass.) 213; Johnson's Adm'r v. Johnson's Ex'r, 2 Hill, Eq. (S. C.) 280; ante, p. 286.

⁷ Combs v. Jackson, 2 Wend. (N. Y.) 153. See 1 Bl. Comm. 461; 2 Kent, Comm. 221.

⁸ Combs v. Jackson, supra; Quadring v. Downs, 2 Mod. 176.

To insure the safety of the ward, the guardianship was given by the law to the next of kin who could not possibly inherit the lands, for the guardianship extended over the person of the ward as well as the land.⁹ On reaching the age of 14 the infant could terminate the guardianship, and elect his own guardian.¹⁰ Guardianship in socage, as stated above, extended over the person of the ward, as well as over the real estate;¹¹ and it extended over personalty connected with the real estate, but not over choses in action and other personal property.¹²

Guardianship in socage was an incident of the feudal system existing in England under the common law of real property. It has fallen into disuse there, and it was never common in this country. In New York, and perhaps in other states, there is a somewhat similar guardianship, known as "guardianship in socage." The Revised Statutes of New York provide: "Where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, duties, and powers of a guardian in socage, shall belong (1) to the father of the infant; (2) if there be no father, to the mother; (3) if there be no father or mother, to the nearest and eldest relative of full age, not being under any legal incapacity, and, as between relatives of the same degree of consanguinity, male shall be preferred."¹³ The guardianship thus created is like the guardianship in socage at common law, except that it continues until the infant reaches the age of 21; and relatives who can inherit from the infant are not excluded, and it makes no difference how the land was acquired.¹⁴

TESTAMENTARY GUARDIANS.

149. By statute, a father, and in some states a mother, on his death, may, generally by will, and in some states by deed, appoint a guardian for a minor

⁹ Co. Litt. § 123; 2 Kent, Comm. 222; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631.

¹⁰ Co. Litt. § 123.

¹¹ Co. Litt. § 123; Com. Dig. "Guardian," B.; 2 Kent, Comm. 221.

¹² *Foley v. Insurance Co.*, 138 N. Y. 333, 34 N. E. 211.

¹³ 4 Rev. St. N. Y. (8th Ed.) p. 2418, § 5.

¹⁴ *Foley v. Insurance Co.*, *supra*; *Fonda v. Van Horne*, *supra*.

child. Such a guardianship extends to the person, and to the real and personal property, of the ward, and continues until the ward's majority.

Testamentary guardianship was created by the statute of 12 Car. II. c. 24, the provisions of which have been substantially enacted in many of the states in this country. It was provided by that statute that the father of minor children could "by deed executed in his lifetime, or by his last will and testament in writing," dispose of their custody and tuition. Under this statute, the father alone could appoint, and he could do so though himself a minor. In this country the statutes of the different states contain various, but not uniform, changes. In some states the appointment can only be made by will, and in some the mother, after the death of the father, succeeds to his power, if she is unmarried. It is sufficient for the appointment of a testamentary guardian that the intention to appoint is clear, although there is no express designation as such in the will, provided that the powers essential to the office are conferred.¹⁵ The authority is derived from the appointment, and requires no confirmation by the court,¹⁶ nor even by the probate of the will;¹⁷ and, when such power has been exercised by the testator, the court has no jurisdiction to appoint a different guardian.¹⁸ By statute, such appointment is sometimes made subject to the probate of the will, and also the approval of the court and the giving of a bond. The office is one of personal trust, and is not assignable.¹⁹ Testamentary guardianship extends to the person, and to the real and personal estate, of the child, and it continues until the ward arrives at full age. The statute of Charles II. does not confer upon the father power to appoint a guardian for his illegitimate child, nor can he delegate any such power to a third

¹⁵ *Bridges v. Hales*, Mos. 108; *Miller v. Harris*, 14 Sim. 540; *Corrigan v. Kiernan*, 1 Bradf. Sur. (N. Y.) 208; *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806; *In re Hawley*, 104 N. Y. 250, 10 N. E. 352; *Balch v. Smith*, 12 N. H. 437.

¹⁶ *Norris v. Harris*, 15 Cal. 226; *Southern Marble Co. v. Stegall*, *supra*.

¹⁷ *Gilliat v. Gilliat*, 3 Phillim. Ecc. 222.

¹⁸ *Copp v. Copp*, 20 N. H. 284; *Robinson v. Zollinger*, 9 Watts (Pa.) 169.

¹⁹ *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 102; *In re Moore*, 11 Ir. Com. Law, 1; *Balch v. Smith*, 12 N. H. 437.

person.²⁰ It is the practice of the courts to adopt the nomination of a guardian by a putative father of a natural child, in cases where he has left an estate, and the person nominated is in all respects proper; but this is simply in deference to the wishes of the deceased, and not as a matter of right which the court is bound to respect.²¹

In Texas, it has lately been held that the statutes of that state providing for the continuance in office of a guardian, and for the appointment of his successor, exclude the idea of another being appointed to succeed him before his removal; and, therefore, that a person appointed, by the will of a father (or, as in this case, a mother), guardian of the estate of a minor child, is not entitled to letters of guardianship while another guardian, appointed at the father's request in his lifetime, is qualified to act.²²

CHANCERY GUARDIANS.

150. Courts of chancery, in the absence of statutory limitations, have jurisdiction to appoint guardians of the persons and estates of infants.

Chancery guardians are appointed by the court of chancery, and in England constitute the most important class of guardians. The jurisdiction of chancery over infants is of very ancient date. Its origin is traced to the delegation by the crown of its duty to protect the helpless, as *parens patriæ*.²³ The court of chancery will not exercise its jurisdiction unless the infant has property,²⁴ but this is often obviated by the settlement of a small amount on the child.²⁵ The appointment may be made when the child has no other guardian, when a suit is pending in which it is interested, or

²⁰ *Ramsay v. Thompson*, 71 Md. 315, 18 Atl. 592, and cases there cited.

²¹ *Ramsay v. Thompson*, *supra*.

²² *Potts v. Terry*, 8 Tex. Civ. App. 394, 28 S. W. 122.

²³ 2 Fonbl. Eq. (5th Ed.) 228, note; 2 Story, Eq. Jur. § 1333; *Butler v. Freeman*, Amb. 301.

²⁴ *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 20.

²⁵ *Eversley*, Dom. Rel. 655.

upon petition without suit.²⁶ In this country, courts of equity often retain a general jurisdiction over the persons and estates of infants,²⁷ though, as a rule, the matter of guardianship is exclusively delegated by statute to the probate court or other similar tribunal.

STATUTE GUARDIANS.

151. Guardians of the persons and estates of infants are generally appointed in this country by courts of special statutory jurisdiction. They are known as "statute guardians."

The probate, surrogate's, orphans', ordinary's, or other similar court generally has, in the various states of this country, full statutory jurisdiction over the persons and estates of minors, and over their guardianship. Guardians appointed by these courts are now generally designated as "statute guardians," and form, in this country, to-day by far the most important class. Their selection and appointment, and their powers, duties, and obligations, are determined in detail to a greater or less degree by statute. In the absence of statutory regulations, the ordinary principles of law governing the relations of guardian and ward apply. When an infant is sole executor, or is the next of kin to whom letters of administration ought to be granted, the probate division of the high court of justice in England will appoint a probate guardian to act *durante minore ætate*, for the purpose of administering the estate.²⁸ In this country the courts generally have statutory powers to select an administrator to act in the infant's place during his minority.

QUASI GUARDIANS, OR GUARDIANS BY ESTOPPEL.

152. Where one who has no right to do so assumes to act as guardian, he may be made to account as guardian.

²⁶ Eversley, Dom. Rel. 655.

²⁷ Pom. Eq. Jur. § 78; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Board of Children's Guardians of Marion Co. v. Shutter*, 139 Ind. 268, 34 N. E. 665.

²⁸ Eversley, Dom. Rel. 653; 1 Williams, Ex'rs, 480.

When one who has not been regularly appointed a guardian assumes to act as such, or, by intermeddling, has taken possession of an infant's estate, he may, at the election of the infant, be treated as a wrongdoer or as a guardian.²⁹ "A mere stranger or wrongdoer, who takes possession of the property of an infant, and receives the rents and profits thereof, may, in equity, be considered as the guardian of the infant, and may be compelled to account as such."³⁰ And, also, when a regular guardian continues to manage the ward's property after the latter's majority, and in effect continues the guardianship, he may be made to account according to the rules pertaining as between a regular guardian and his ward.³¹ Ordinarily, however, on the termination of the guardianship, the relation changes from that of guardian and ward to that of debtor and creditor.³²

GUARDIANS OF PERSONS NON COMPOTES MENTIS.

153. Generally, by statute, the probate or some similar court is given the power to appoint a guardian of the person and estate of persons who are non compotes mentis. In some states the power is extended to include spendthrifts.

The crown, as *parens patriæ*, had authority over the care and custody of infants; but this authority did not originally extend to insane persons and other persons non compotes mentis. It was, however, conferred on the crown by parliament, and intrusted under the sovereign's sign manual to the lord chancellor. In this country the guardianship of persons who are non compotes mentis is wholly

²⁹ *Revett v. Harvey*, 1 Sim. & S. 502; *Wall v. Stanwick*, 34 Ch. Div. 763; *Blomfield v. Eyre*, 8 Beav. 250; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *Pennington v. L'Hommedieu*, 7 N. J. Eq. 343; *Alston v. Alston*, 34 Ala. 15; *Crooks v. Turpen*, 1 B. Mon. (Ky.) 183; *Lehmann v. Rothbarth*, 111 Ill. 185; *Martin's Adm'r v. Fielder*, 82 Va. 455, 4 S. E. 602.

³⁰ *Van Epps v. Van Deusen*, *supra*.

³¹ *Mellish v. Mellish*, 1 Sim. & S. 133.

³² *Crowell's Appeal*, 2 Watts (Pa.) 295; *Cunningham v. Cunningham*, 4 Grat. (Va.) 43.

regulated by statute in the different states, jurisdiction being generally conferred upon the probate or other similar court. Guardianship over spendthrifts was unknown at common law, but is not uncommon under statutes in this country.* Guardianship of persons non compos mentis is governed by substantially the same principles and rules of law as the guardianship of infants.

GUARDIANS AD LITEM.

154. A guardian ad litem is a guardian appointed by a court of justice to prosecute or defend for an infant in a suit to which he is a party.

Every court in which suit is brought against an infant has the power to appoint a person to defend for him, when he has no guardian; for, as an infant cannot appoint an attorney, he would otherwise be without assistance. A person so appointed is called a "guardian ad litem." His powers and duties, as the term implies, are limited to the defense of the suit.³³ A guardian ad litem may also be appointed to sue for an infant, but this is not usual, as an infant generally sues by next friend.³⁴ The appointment of a guardian ad litem will be considered when we come to treat of infants, and of actions by and against them.

SELECTION AND APPOINTMENT OF GUARDIANS BY COURT.

155. The selection of a guardian by the court is discretionary. The father, or, in this country, the mother if he is dead, or, if both are dead, one of the next of kin, will be appointed, unless he is unfit, or the interests of the child demand the appointment of some one else.

156. A child over 14 could select his own guardian for nurture or in socage, at common law, and may se-

* Post, p. 417.

³³ Co. Litt. 88b; Bouv. Law Dict. "Guardian"; post, p. 412.

³⁴ Post, p. 412.

lect his statute guardian in this country, if the person selected is suitable.

157. But the court will not appoint as guardian,

- (a) In England, a married woman, though in this country the marriage of a woman is generally not regarded as a disqualification.
- (b) Nonresidents, as a rule, though it has the power to do so.
- (c) Persons whose interests may be adverse to those of the ward.

In the selection of a guardian, the court has a liberal,³⁵ but not arbitrary,³⁶ discretion. It will generally respect the natural claim of the father to act as guardian of his child. An appointment, though too informal to be good as a testamentary appointment, has great weight with the court in the selection of a guardian.³⁷ And, generally, the wishes of a deceased parent will prevail, in the absence of good reasons to the contrary.³⁸ The best interests of the infant will prevail, however, against even the claim of a father, when he is not a suitable person.³⁹ In this country, particularly, the benefit of the ward is the paramount consideration with the court; and some third person is often appointed, not only when the father is unfit, but solely out of consideration for the general welfare of the child.⁴⁰

³⁵ *In re Kaye*, 1 Ch. App. 387; *Nelson v. Green*, 22 Ark. 367; *State v. Houston*, 32 La. Ann. 1305; *Battle v. Vick*, 4 Dev. (N. C.) 294; *In re Johnson*, 87 Iowa, 130, 54 N. W. 69; *Crawford v. Crawford* (Iowa) 60 N. W. 501.

³⁶ *White v. Pomeroy*, 7 Barb. (N. Y.) 640.

³⁷ *Hall v. Stork*, 5 Law J. Exch. 97; *In re Kaye*, 1 Ch. App. 387; *In re Mercellin*, 24 Hun, 207. And see *Knott v. Cottee*, 2 Phil. Ch. 192, where a recommendation in a will as to the custody of a child was followed.

³⁸ *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216; *Cozine v. Horn*, 1 Bradf. Sur. (N. Y.) 143; *In re Turner*, 19 N. J. Eq. 433; *Badenhoof v. Johnson*, 11 Nev. 87; *Watson v. Warnock*, 31 Ga. 716.

³⁹ *Ex parte Mountfort*, 15 Ves. 445; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Thomas v. Roberts*, 3 De Gex & S. 758.

⁴⁰ *Heinemann's Appeal*, 96 Pa. St. 112; *Page v. Hodgdon*, 63 N. H. 53; *Griffin v. Sarsfield*, 2 Dem. Sur. (N. Y.) 4; *Huie v. Nixon*, 6 Port. (Ala.) 77; *Badenhoof v. Johnson*, 11 Nev. 87; *Luppie v. Winans*, 37 N. J. Eq. 245; *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216; *In re McGrath* [1893] 1 Ch. 143.

If the father is not living, the mother, in this country, will generally be appointed, unless there is some good reason why she should not.⁴¹ If the child is an orphan, the preference will be given to the next of kin as against strangers.⁴² At common law an infant over 14 years of age could select his guardian by nurture or in socage;⁴³ and, by statutory enactment, an infant of 14 may generally nominate his own guardian, and such person must be appointed by the court, if suitable.⁴⁴ It is even held that the infant may nominate a guardian to supersede one already appointed by the court,⁴⁵ but there is also authority to the contrary.⁴⁶

The appointment of a married woman as guardian is held improper in England,⁴⁷ but a female guardian who marries may be reappointed after a reference to ascertain whether her reappointment is for the benefit of the child.⁴⁸ In this country it has been said to be against the policy of the law to appoint a married woman as guardian,⁴⁹ but, by the weight of authority, she is competent to act in that capacity.⁵⁰ When her husband is unsuitable, the appointment has been refused.

⁴¹ *Albert v. Perry*, 14 N. J. Eq. 540; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Ramsay v. Ramsay*, 20 Wis. 507.

⁴² *Johnstone v. Beattie*, 10 Clark & F. 42; *Sullivan's Case*, 1 Moll. 225; *Albert v. Perry*, 14 N. J. Eq. 540; *Morehouse v. Cooke*, Hopk. Ch. (N. Y.) 226. There are frequently statutory enactments to the same effect.

⁴³ 1 Bl. Comm. 462; *Ex parte Edwards*, 3 Atk. 519; *Mauro v. Ritchie*, 3 Cranch, C. C. 147, Fed. Cas. No. 9,312; *Pitts v. Cherry*, 14 Ga. 594.

⁴⁴ *Adams' Appeal*, 38 Conn. 304; *Lunt v. Aubens*, 39 Me. 392; *Montgomery v. Smith*, 3 Dana (Ky.) 599; *Arthur's Appeal*, 1 Grant, Cas. (Pa.) 55; *Sessions v. Kell*, 30 Miss. 458; *Kelly v. Smith*, 15 Ala. 687.

⁴⁵ *Sessions v. Kell*, *supra*; *Bryce v. Wynn*, 50 Ga. 332; *Kelly v. Smith*, *supra*; *Montgomery v. Smith*, *supra*.

⁴⁶ *Gray's Appeal*, 96 Pa. St. 243; *Ham v. Ham*, 15 Grat. (Va.) 74; *Mauro v. Ritchie*, 3 Cranch, C. C. 147, Fed. Cas. No. 9,312.

⁴⁷ *In re Kaye*, 1 Ch. App. 387.

⁴⁸ *In re Gornall*, 1 Beav. 347; *Jones v. Powell*, 9 Beav. 345.

⁴⁹ *Holley v. Chamberlain*, 1 Redf. Sur. (N. Y.) 333, overruled by *In re Hermance*, 2 Dem. Sur. (N. Y.) 1,—married women having been made competent by statute in New York.

⁵⁰ *Beard v. Dean*, 64 Ga. 258; *Farrer v. Clark*, 29 Miss. 195; *Jarrett v. State*, 5 Gill & J. (Md.) 27; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Goss v. Stone*, 63 Mich. 319, 29 N. W. 735; *Ex parte Maxwell*, 19 Ind. 88; *Succession of Gaines*, 42 La. Ann. 699, 7 South. 788.

on the ground that the wife would be under his influence.⁵¹ A non-resident will ordinarily not be appointed, since he is not amenable to the jurisdiction of the court;⁵² but such appointments are within the power of the court,⁵³ unless contrary to statutory provisions.⁵⁴

An executor or administrator of an estate in which an infant has an interest has been held not to be a proper person, on the ground that his interests may be adverse to those of the child.⁵⁵ But the trustee of an infant is a proper person,⁵⁶ unless it appears that he has acted or may act to the infant's prejudice.⁵⁷ The rule is general that the court will not appoint a person whose interests are or may be adverse to those of the infant.⁵⁸ The court may appoint a corporation as guardian where it is authorized by statute to act in that capacity.⁵⁹ But the appointment of a firm designated in a will has been refused.⁶⁰

JURISDICTION TO APPOINT GUARDIAN.

158. A guardian can only be appointed by a court within whose jurisdiction the minor has his residence, or has property.

The place of residence of an infant determines the court which has jurisdiction to appoint a guardian;⁶¹ but, when a nonresident

⁵¹ *Kettletas v. Gardner*, 1 Paige (N. Y.) 488; *Ex parte Maxwell*, 19 Ind. 88.

⁵² *Logan v. Fairlee*, Jac. 193; *Johnstone v. Beattie*, 10 Clark & F. 42, 86; *In re Taylor*, 3 Redf. Sur. (N. Y.) 259.

⁵³ *Daniel v. Newton*, 8 Beav. 485; *Berry v. Johnson*, 53 Me. 401.

⁵⁴ *Finney v. State*, 9 Mo. 227.

⁵⁵ *Griffin v. Sarsfield*, 2 Dem. Sur. (N. Y.) 4; *Ex parte Crutchfield*, 3 Yerg. (Tenn.) 336; *Isaacs v. Taylor*, 3 Dana (Ky.) 600.

⁵⁶ *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216.

⁵⁷ As where he has subordinated the interest of the child to those of another cestui que trust. *Barnsback v. Dewey*, 13 Ill. App. 581.

⁵⁸ *Van Beuren's Estate* (Surr.) 13 N. Y. Supp. 261; *Corwin's Appeal*, 126 Pa. St. 326, 19 Atl. 38; *In re Brien's Estate* (Sup.) 11 N. Y. Supp. 522.

⁵⁹ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232; *In re Cordova*, 4 Redf. Sur. (N. Y.) 66; *Ledwith v. Ledwith*, 1 Dem. Sur. (N. Y.) 154; *Glaser v. Priest*, 29 Mo. App. 1; *Johnson v. Johnson*, 88 Ky. 275, 11 S. W. 5; *In re Brien's Estate* (Sup.) 11 N. Y. Supp. 522.

⁶⁰ *De Mazar v. Pybus*, 4 Ves. 644.

⁶¹ *Brown v. Lynch*, 2 Bradf. Sur. (N. Y.) 214; *Ware v. Coleman*, 6 J. J.

infant has property within the jurisdiction, a guardian may usually be appointed by the court of the county where the property is situated.⁶² Although the legal domicil be elsewhere, residence in fact has been held sufficient to confer jurisdiction.⁶³ An appointment made when the infant has neither a residence nor property is void, and may be attacked collaterally;⁶⁴ but, when the court has jurisdiction, an appointment can only be set aside by direct proceedings in the same court,⁶⁵ and, although there was no personal service on the ward, the appointment cannot be attacked collaterally.⁶⁶

Marsh. (Ky.) 198; Maxsom's Lessee v. Sawyer, 12 Ohio, 195; Dorman v. Ogbourne, 16 Ala. 759; Darden v. Wyatt, 15 Ga. 414; Lewis v. Castello, 17 Mo. App. 593; Herring v. Goodson, 43 Miss. 392; Harding v. Weld, 128 Mass. 587; Sears v. Terry, 26 Conn. 273.

⁶² Logan v. Fairlee, Jac. 193; Stephens v. James, 1 Mylne & K. 627; Seaverns v. Gerke, 3 Sawy. 353, Fed. Cas. No. 12,595; Clarke v. Cordis, 4 Allen (Mass.) 466; In re Hubbard, 82 N. Y. 90; Rice's Case, 42 Mich. 528, 4 N. W. 284; Davis v. Hudson, 29 Minn. 27, 11 N. W. 136; Grier v. McLendon, 7 Ga. 362; Barnsback v. Dewey, 13 Ill. App. 581; Neal v. Bartleson, 65 Tex. 478.

⁶³ Johnstone v. Beattie, 10 Clark & F. 42; In re Hubbard, 82 N. Y. 90; Ross v. Railroad Co., 53 Ga. 514.

⁶⁴ Cases cited in notes 61 and 62, *supra*.

⁶⁵ Grier v. McLendon, 7 Ga. 362; Sears v. Terry, 26 Conn. 273; People v. Wilcox, 22 Barb. (N. Y.) 178; Speight v. Knight, 11 Ala. 461; Pannill's Adm'r v. Calloway's Committee, 78 Va. 387.

⁶⁶ Board of Children's Guardians of Marion Co. v. Shutter, 139 Ind. 268, 34 N. E. 665; Kurtz v. Railroad Co., 48 Minn. 339, 51 N. W. 221; Kurtz v. Land Co., 52 Minn. 140, 53 N. W. 1132; Appeal of Gibson, 154 Mass. 378, 28 N. E. 206.

CHAPTER XII.

RIGHTS, DUTIES, AND LIABILITIES OF GUARDIANS.

- 159. Guardian's Right to Custody of Ward.
- 160. Guardian's Right to Ward's Services.
- 161-165. Maintenance of Ward.
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 - 163. Reimbursement for Support.
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 - 170. Degree of Care Required.
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 - 178. Power to Execute Instruments.
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- 180-182. Inventory and Accounts.
 - 183. Compensation of Guardian.
 - 184. Settlements Out of Court.
 - 185. Gifts from Ward to Guardian.

GUARDIAN'S RIGHT TO CUSTODY OF WARD.

159. The guardian is ordinarily entitled to the custody of his ward, except, in this country, as against the parents. In all cases the courts have a discretion, and will award the custody as may be best for the interests of the child.

The rule of the English courts is that a guardian is entitled to the custody of the person of his ward, not only as against strangers, but even as against the child's parents.¹ In this country the

¹ Wright v. Naylor, 5 Madd. 77; In re Andrews, L. R. 8 Q. B. 153; Eyre v. Countess of Shaftsbury, 2 P. Wms. 103.

custody of the ward will ordinarily be given to its guardian, both as against strangers and as against relations,² with the exception of its parents. The rights of the parent are generally conceded by the courts to be superior to those of the guardian.³ The right to the ward's custody is often regulated by statute. In the award of the custody of the child's person, even as between parent and guardian, the courts will exercise a reasonable discretion, and when the question arises as to the right to its custody, as between its parent and another,⁴ will be largely influenced by the child's best interests.⁵ If the child is of sufficient discretion, the court will take its wishes into consideration.⁶

GUARDIAN'S RIGHT TO WARD'S SERVICES.

160. A guardian, as such, is not entitled, like a parent, to his ward's services and earnings.

A guardian, as such, has no right to his ward's services, corresponding to the parent's right to the services of his minor child.⁷ When an infant is living with and supported by his guardian as a member of his family, and renders ordinary household services, it has been held that he may set off the value of such services against the guardian's claim for maintenance.⁸ There are

² *Coltman v. Hall*, 31 Me. 196; *Bounell v. Berryhill*, 2 Cart. (Ind.) 613; *Johns v. Emmert*, 62 Ind. 533; *Ex parte Ralston*, R. M. Charl. (Ga.) 119.

³ *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Wood v. Wood*, 5 Paige (N. Y.) 596; *Ramsay v. Ramsay*, 20 Wis. 507; *Lord v. Hough*, 37 Cal. 657. The guardian is entitled to his ward's custody in the absence of an award to another, and is not answerable for false imprisonment in asserting his right thereto. *Townsend v. Kendall*, 4 Minn. 412 (Gil. 315).

⁴ *Ante*, p. 246.

⁵ *Roach v. Garvan*, 1 Ves. Sr. 157; *Garner v. Gordon*, 41 Ind. 92; *Ward v. Roper*, 7 Humph. (Tenn.) 111; *In re Heather Children*, 50 Mich. 261, 15 N. W. 487.

⁶ *Anon.*, 2 Ves. Sr. 374; *People v. Wilcox*, 22 Barb. (N. Y.) 178.

⁷ *Haskell v. Jewell*, 59 Vt. 91, 7 Atl. 545; *Bass v. Cook*, 4 Port. (Ala.) 390; *In re Clark*, 36 Hun (N. Y.) 301; *Denison v. Cornwell*, 17 Serg. & R. (Pa.) 377; *Hayden v. Stone*, 1 Duv. (Ky.) 400; *Blanchard v. Ilsley*, 120 Mass. 487.

⁸ *Phillips v. Davis*, 2 Sneed (Tenn.) 520; *Calhoun v. Calhoun*, 41 Ala. 369; *Crosby v. Crosby*, 1 S. C. 337. As to the right to charge for ward's support, see post, p. 314.

cases, however, which hold the contrary.⁹ The guardian, not being entitled to the services of his ward, cannot, as such, bring an action for loss of services caused by a tortious injury, as for the seduction of a female ward.¹⁰ If, however, the guardian stands in loco parentis, so that he has the same rights as a parent would have, including the right to control the child's services, he may maintain such an action.¹¹

MAINTENANCE OF WARD—CONTRACTS.

161. A guardian is bound to maintain his ward from the income of the estate, but he is not bound to furnish support personally, and no promise on his part will be implied, without his consent, to pay even for necessities furnished the ward.
162. A guardian cannot, by contract, bind either the ward or his estate. He is primarily personally liable on contracts, though made by him as guardian, and on behalf of the ward, but in proper cases he is entitled to reimbursement.
163. By the weight of authority, when the ward lives with the guardian as a member of his family, receiving support, and rendering the ordinary services of a child, the guardian is not entitled to an allowance for such support, in the absence of an agreement, the relation in such case being quasi parental.

It is the duty of the guardian to maintain and educate his ward in a manner suitable to his means, from the income of the ward's estate.¹² Although the ward's father is living, the guardian

⁹ *Moyer v. Fletcher*, 56 Mich. 508, 23 N. W. 198; *Armstrong's Heirs v. Walkup*, 12 Grat. (Va.) 608.

¹⁰ *Blanchard v. Ilsley*, 120 Mass. 487.

¹¹ *Fernsler v. Moyer*, 3 Watts & S. (Pa.) 416. See *Bartley v. Richtmyer*, 4 N. Y. 38; ante, p. 276.

¹² *Reading v. Wilson*, 38 N. J. Eq. 446; *Preble v. Longfellow*, 48 Me. 279; *Roscoe v. McDonald*, 101 Mich. 313, 59 N. W. 603, and cases hereafter cited.

should provide for his maintenance out of his estate, provided the father is unable to do so, and a court of equity will order an allowance for such maintenance.¹³

A guardian is under no personal obligation to support his ward, and therefore no promise on his part will be implied, as a matter of law, to pay even for his ward's necessities. "A guardian is not responsible, either personally or in his fiduciary character, for necessities furnished his ward without his consent, express or implied."¹⁴ If a guardian should willfully withhold from his ward necessities suited to his fortune and condition in life, equity, or the probate or other court having jurisdiction of the guardianship, would compel him to supply them, and if a stranger, ad interim, should furnish them, he would be reimbursed out of the ward's fortune; but no one could furnish even necessities without the guardian's consent, and maintain an action against the guardian therefor. Where, therefore, a guardian refuses or neglects to furnish his ward a support, "the remedy is by application to the court, which will dismiss the guardian for neglect of duty, or the infant may himself purchase necessities; or, if of such a tender age that he cannot contract himself, a third person may supply his wants. But then the guardian is not liable, but the infant. In that case suit must be brought against the infant, who can appear by guardian, and not against the guardian himself; and the judgment, when rendered, is against the infant, and execution can only be had of the estate of the infant."¹⁵

¹³ *Errat v. Barlow*, 14 Ves. 202; *Ex parte Mountfort*, 15 Ves. 449; *Clark v. Montgomery*, 23 Barb. (N. Y.) 464; *Beasley v. Watson*, 41 Ala. 234; *Waldrom v. Waldrom*, 76 Ala. 285; *State v. Martin*, 18 Mo. App. 468; *Newport v. Cook*, 2 Ashm. (Pa.) 332.

¹⁴ *Barnum v. Frost's Adm'r*, 17 Grat. (Va.) 398; *Overton v. Beavers*, 19 Ark. 623; *Edmunds v. Davis*, 1 Hill (S. C.) 279; *Tucker v. McKee*, 1 Bailey (S. C.) 344; *Call v. Ward*, 4 Watts & S. (Pa.) 118; *Bredin v. Dwen*, 2 Watts (Pa.) 95; *Penfield v. Savage*, 2 Conn. 387; *McDaniel v. Mann*, 25 Tex. 101; *Gwaltney v. Cannon*, 31 Ind. 227; *State v. Cook*, 12 Ired. (N. C.) 67; *Spring v. Woodworth*, 4 Allen (Mass.) 326. A guardian has the same right as a parent to decide what are necessities, and any one supplying the child does so at his peril. *Nicholson v. Spencer*, 11 Ga. 607; *Kraker v. Byrum*, 13 Rich. (S. C.) 163; *McKanna v. Merry*, 61 Ill. 177.

¹⁵ *Call v. Ward*, *supra*.

Clearly, no consent on the part of the guardian can be implied where necessities are furnished without his knowledge, nor can his consent be implied, even where he has such knowledge, if the circumstances are such that he cannot be held to know that the party furnishing them believes he consents. If his knowledge and acquiescence are as consistent with want of consent as with consent, his consent will not be implied.¹⁶

The guardian's authority is limited to supplying the needs of the ward out of the income of the estate. He cannot, by contract, render the ward personally liable even for necessities, nor can he bind the ward's estate.¹⁷ On contracts made by him, the guardian renders himself personally liable, though he may expressly contract as guardian;¹⁸ but in proper cases he is entitled to reimbursement out of the ward's estate.¹⁹ In a Massachusetts case a guardian gave a promissory note, as guardian, to effect the release of his ward from an execution against the person, and it was held that he was personally liable thereon. In answer to an objection that the defendant guardian was not personally liable, as he contracted only as guardian, the court said: "As an administrator cannot, by his promise, bind the estate of his intestate, so neither can the guardian, by his contract, bind the person or estate of his ward. Unless, therefore, the defendant

¹⁶ *Call v. Ward*, supra; *Edmunds v. Davis*, supra; *Overton v. Beavers*, supra. Where, on a father's refusal to support his child, a relative furnished support, it was held that the child's guardian, who had no knowledge of the father's refusal, was not liable to the relative for such support, though he had sufficient funds belonging to the ward. *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104.

¹⁷ *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Forster v. Fuller*, 6 Mass. 58; *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414; *Reading v. Wilson*, 38 N. J. Eq. 446; *Tenney v. Evans*, 14 N. H. 343; *Sperry v. Fanning*, 80 Ill. 371; *State v. Clark*, 16 Ind. 97; *Brown v. Grant*, 29 W. Va. 117, 11 S. E. 900; *Lusk v. Patterson*, 2 Colo. App. 306, 30 Pac. 253.

¹⁸ *Forster v. Fuller*, supra; *Thacher v. Dinsmore*, 5 Mass. 209; *Rollins v. Marsh*, 128 Mass. 116; *Simms v. Norris*, 5 Ala. 42; *Sperry v. Fanning*, 80 Ill. 371; *Hunt v. Maldonado* (Cal.) 27 Pac. 56; *McNabb v. Clipp*, 5 Ind. App. 204, 31 N. E. 858; *Lewis v. Edwards*, 44 Ind. 333. His promise is not within the statute of frauds, and need not be in writing. *Roche v. Chaplin*, 1 Bailey (S. C.) 419; *McNabb v. Clipp*, supra.

¹⁹ *Post*, p. 313.

is liable to pay this note, the plaintiff has no remedy. But we are satisfied that the defendant is liable. It is his promise, made on a sufficient consideration; and although, in the note, he states that he promises as guardian, yet he is personally bound,—his trust being inserted only to entitle himself to indemnity from his ward, with which the plaintiff has no concern.”²⁰ When a guardian incurs liability in excess of the estate, and fails to limit his liability, he is personally liable for the excess.²¹

A guardian cannot exceed the income of the estate in the maintenance of his ward, without leave of court. “When a guardian finds that the income of the ward’s estate is not sufficient for his maintenance, it is his duty to submit the whole matter to the consideration of the court, and to act under its directions. If he proceeds otherwise, he acts upon his own responsibility.”²² It has been held that a guardian has no authority to make advances from his own means for the maintenance of his ward, and that where he does so he cannot recover the amount advanced, from the ward, after the latter attains his majority.²³ This, however, cannot prevent a guardian from advancing the means necessary to support the ward, and claiming to be reimbursed out of the estate of his ward which subsequently comes into his hands. Reimbursement will be allowed in a proper case.²⁴

By the weight of authority, when a ward is living with his guardian as a member of his family, receiving support, on the one hand, and rendering household services, on the other, it will be assumed, in the absence of evidence to the contrary, that they are living in the relation of parent and child; and the guardian cannot, under such circumstances, charge the ward’s estate for maintenance. Nor, of course, under such circumstances, could the ward recover for his

²⁰ *Forster v. Fuller*, *supra*.

²¹ *Hutchinson v. Hutchinson*, 19 Vt. 437; *Broadus v. Rosson*, 3 Leigh (Va.) 12.

²² *Patton v. Thompson*, 2 Jones, Eq. (N. C.) 411. And see *post*, pp. 315, 325, and cases there cited.

²³ *Preble v. Longfellow*, 48 Me. 279.

²⁴ *Patton v. Thompson*, *supra*; *Johnston v. Coleman*, 3 Jones Eq. (N. C.) 293; *Withers v. Hickman*, 6 B. Mon. (Ky.) 292; *Gott v. Culp*, 45 Mich. 265, 7 N. W. 767; *Speer v. Tinsley*, 55 Ga. 89.

services. "Where the family relation exists, whether natural or assumed, there is, in the absence of an express agreement, or circumstances from which an agreement may be fairly inferred, no implied obligation to pay for board, on the one hand, or for work, on the other."²⁵ There are many cases, however, which do not support this view, but which hold that a guardian who takes his ward into his family to live is entitled to reasonable compensation for board and clothing furnished, though no express agreement to charge and to pay therefor is shown, and though the ward assists in the performance of household duties.²⁶

²⁵ *Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709. And see *Webster v. Wadsworth*, 44 Ind. 283; *Mulhern v. McDavitt*, 16 Gray (Mass.) 404; *Folger v. Heidel*, 60 Mo. 285; *Douglas' Appeal*, 82 Pa. St. 169; *Horton's Appeal*, 94 Pa. St. 62; *Otis v. Hall*, 117 N. Y. 131, 22 N. E. 563. In *Otis v. Hall*, supra, on an accounting by a guardian, it appeared that having no children of his own, he had told the stepfather of his ward that he would take the child into his family, and bring him up as his own; that he would collect certain pension money due the ward, and pay it over to him, with interest, when he became of age; that, upon this understanding, he was appointed guardian of the child, took him into his family, and always spoke of him as his child, saying that he had adopted him. The ward lived with him, and did the usual work of the farm. It was held that the guardian stood in loco parentis, and was not entitled to any allowance for maintenance of the ward. "It is well settled," said the court, "that where parties sustain the relation of parent and child, either by nature or adoption, the former, in the absence of an express promise, cannot be required to pay for services rendered by the child, nor the latter be obliged to pay for maintenance."

²⁶ *Moyer v. Fletcher*, 56 Mich. 508, 23 N. W. 198. And see *Armstrong's Heirs v. Walkup*, 12 Grat. (Va.) 608; *Pratt's Adm'r v. Baker*, 56 Vt. 70; *Rawson v. Corbett*, 43 Ill. App. 127; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048; *Jacobia v. Terry*, 92 Mich. 275, 52 N. W. 629. In some of the cases cited, there were peculiar circumstances which may be regarded as distinguishing them from *Doan v. Dow*, and other cases cited in note 25, supra, so that they are not against the proposition to which those cases are cited. Thus, in *Pyatt v. Pyatt*, supra, the guardian used the ward's money to support the ward. This shows an intention to charge the ward. And compare *In re Livernois' Estate*, 78 Mich. 332, 44 N. W. 279, with *Moyer v. Fletcher*, supra.



SAME—USE OF PRINCIPAL OF ESTATE.

164. The guardian is restricted to the use of the income of the estate in the maintenance and education of the ward, unless he has obtained leave of the court to use the principal.
165. Such leave will be granted in a case of necessity, or where the advantage to the ward clearly demands it. And the court may approve such use by the guardian, without previous application for leave, where the court would have authorized it if application had been made.

In the maintenance of the ward the guardian is ordinarily authorized to use only the income of the estate. He cannot break in upon the principal without the sanction of the court. If necessary, the court will authorize such an expenditure,²⁷ but the guardian must apply to the court, and, if he assumes to judge of the necessity himself, he does so at his own risk, and on his own responsibility.²⁸ Such a rule as this is necessary to protect the property of the ward, and this is its object. "A guardian," said the Illinois court, "will not be permitted to expend upon the maintenance and education of his ward more than the income of the estate, without the sanction of the court. The court itself, on an application, proper as to time, would proceed with the utmost degree of caution, and would withhold its sanction, except in a case of strong necessity or advantage

²⁷ Villard v. Robert, 2 Strobb. Eq. (S. C.) 40; Harvey v. Harvey, 2 P. Wms. 21; In re Bostwick, 4 Johns. Ch. (N. Y.) 100; Roseborough v. Roseborough, 3 Baxt. (Tenn.) 314; Newport v. Cook, 2 Ashm. (Pa.) 332; Withers v. Hickman, 6 B. Mon. (Ky.) 292.

²⁸ Villard v. Robert, *supra*; Walker v. Wetherell, 6 Ves. 473; Lee v. Brown, 4 Ves. 362, 369; In re Bostwick, 4 Johns. Ch. (N. Y.) 100; Davis v. Harkness, 1 Gilm. (Ill.) 173; Beeler v. Dunn, 3 Head (Tenn.) 87; Owens v. Pearce, 10 Lea (Tenn.) 45; Phillips v. Davis, 2 Sneed. (Tenn.) 520; State v. Clark, 16 Ind. 97; Dowling v. Feeley, 72 Ga. 557; McDowell v. Caldwell, 2 McCord, Eq. (S. C.) 43; Myers v. Wade, 6 Rand. (Va.) 444; Rinker v. Streit, 33 Grat. (Va.) 663; Johnston v. Coleman, 3 Jones, Eq. (N. C.) 290; Gilbert v. McEachen, 38 Miss. 469.

to the ward, very clearly made out. In a case where the ward had considerable expectancies, or his estate had not yet been reduced to possession, or he was likely to suffer for the common necessities of life, or, exhibiting fine talents, it was desirable to expend his small estate in his education, with a view to his future advancement in life; in these and similar instances of necessity or advantage to the ward, the court would authorize the expenditure of the capital of his estate."²⁹ The ward's real property cannot be sold to provide for maintenance without leave of court first obtained.³⁰ Nor can the proceeds of real estate sold for reinvestment be so used.³¹

Though a guardian always intrenches upon the principal of his ward's estate at his own peril, the fact that he does so does not necessarily bar him from an allowance therefor. The rule, on the contrary, is well established that the court will approve such a use of the principal by the guardian, without a previous application for leave of the court, where it is clear that the court would have authorized it if application had been made.³²

CHANGE OF WARD'S DOMICILE BY GUARDIAN.

166. A natural guardian can change his ward's domicile.

Other guardians can change the municipal domicile, but, by the weight of authority, they cannot change the state or national domicile.

There is considerable conflict in the authorities as to the power of a guardian to change the domicile of his ward. In England it is held that, where the guardian is also a parent, the domicile, according to the rule as between parent and child, follows that of the parent, although the child's rights of succession to property may be thereby

²⁹ Villard v. Robert, *supra*.

³⁰ Post, p. 336.

³¹ Strong v. Moe, 8 Allen (Mass.) 125; Rinker v. Strelt, 33 Grat. (Va.) 663.

³² Lee v. Brown, 4 Ves. 362; Prince v. Hine, 26 Beav. 634; Browne v. Bedford, 4 Dem. Surr. (N. Y.) 304; Jarret v. Andrews, 7 Bush (Ky.) 312; Barton v. Bowen, 27 Grat. (Va.) 849; Calhoun v. Calhoun, 41 Ala. 369; Roseborough v. Roseborough, 3 Baxt. (Tenn.) 314; Long v. Norcom, 2 Ired. Eq. (N. C.) 354; Bellamy v. Thornton (Ala.) 15 South. 831; Maupin's Ex'r v. Dulany's Devisees, 5 Dana (Ky.) 589.

altered to his prejudice.³³ It has been doubted whether a guardian who is not a parent can change the ward's domicile, but the question does not seem to have been passed upon by the English courts.³⁴ In this country the rule is uniform, as in England, that a natural guardian may in good faith change his ward's domicile from one state or county to another.³⁵ In a late Iowa case it was held that the paternal grandfather of an orphan child, being the child's natural guardian, could change his domicile to another state.³⁶

It seems also to be the uniform rule in this country that guardians, other than natural guardians, may change the municipal domicile of the ward; that is, that they may change it from one place to another in the same state. It was said in a New York case: "In the present instance the residence of the infant has been changed from one county to another, but still has been retained under the sovereignty of the same laws. This, I have no doubt, is completely within the scope of the guardian's authority. No rights are impaired or affected by the act, the jurisdiction of the state is preserved, and no other consequence flows from the change of residence than the substitution of one officer in the place of another,—a result entirely conformable to those purposes of convenience contemplated by the statute in regulating the appointment of a guardian by the surrogate of the county where the infant resides."³⁷ Whether or not a guardian, who is not a natural guardian, has the power to change his ward's domicile from one state or country to another, is a question upon which the authorities are in direct conflict. By the weight of authority, it seems, they have no such power.³⁸

³³ *Pottinger v. Wightman*, 3 Mer. 67; *Johnstone v. Beattie*, 10 Clark & F. 42.

³⁴ *Eversley*, Dom. Rel. 692; *Dicey*, Dom. 100; *Jac. Dom.* § 254.

³⁵ *Jac. Dom.* § 260; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Pedan v. Robb*, 8 Ohio, 227; *In re Benton* (Iowa) 60 N. W. 614; ante, p. 292.

³⁶ *In re Benton*, supra. But see *Marheineke v. Grothaus*, 72 Mo. 204.

³⁷ *Ex parte Bartlett*, 4 Bradf. Sur. (N. Y.) 221. And see *Jac. Dom.* § 257; *Kirkland v. Whately*, 4 Allen (Mass.) 462; *Anderson v. Anderson*, 42 Vt. 350. But the domicile of the guardian is not necessarily that of the ward. *School Directors v. James*, 2 Watts & S. (Pa.) 568.

³⁸ *Daniel v. Hill*, 52 Ala. 430; *Mears v. Sinclair*, 1 W. Va. 185; *Ex parte Bartlett*, 4 Bradf. Sur. (N. Y.) 221; *Seiter v. Straub*, 1 Dem. Sur. (N. Y.) 264; *School Directors v. James*, 2 Watts & S. (Pa.) 568; *Wilkins' Guardian*, 146

In all cases, in the absence of statutory restrictions on its power, a court of chancery has the power to restrain the removal of a child, where its interests will be injuriously affected. The court, as the protector of infants, has this power, even as against a natural guardian, though it must be a very extreme or special case to induce it to interfere.³⁹ In the case of testamentary, chancery, or statute guardians, it will not hesitate to interfere where its interference is necessary for the child's protection.⁴⁰

MANAGEMENT OF ESTATE—GUARDIANSHIP AS A TRUST.

167. A guardian is a trustee, and therefore—

- (a) He cannot reap any benefit from the use of his ward's property.
- (b) He cannot purchase at a sale of his ward's property.
- (c) He cannot sell his own property to his ward.

168. The ward has all the rights, as against the guardian, that a cestui que trust has against the trustee. And therefore—

- (a) He may ratify the wrongful use of his property by the guardian, and claim all profits arising therefrom, or repudiate the transaction and hold the guardian to account.
- (b) He may repudiate purchases of his real estate by his guardian, and claim a resulting trust.
- (c) He may trace and reclaim personal property converted by his guardian, when it can be identified.

Pa. St. 585, 23 Atl. 325; *Lamar v. Micou*, 112 U. S. 472, 5 Sup. Ct. 221. But see *Pedan v. Robb's Adm'r*, 8 Ohio, 227; *Townsend v. Kendall*, 4 Minn. 412 (Gil. 315); *Wood v. Wood*, 5 Paige (N. Y.) 596; *White v. Howard*, 52 Barb. (N. Y.) 294; *Wheeler v. Hollis*, 19 Tex. 522; *In re Afflick's Estate*, 3 MacArthur, 95.

³⁹ *Creuze v. Hunter*, 2 Cox, Ch. 242; *De Manneville v. De Manneville*, 10 Ves. 52; *Wellesley v. Wellesley*, 1 Dow. & C. 152; *Wood v. Wood*, 5 Paige (N. Y.) 596.

⁴⁰ *Wood v. Wood*, *supra*.

The relation of guardian and ward is that of trustee and cestui que trust.⁴¹ Whenever the guardian makes use of the ward's property with the object of reaping a personal advantage, or does any act which would amount to a breach of trust, either in fact or in law, the ward, on attaining his majority, may either ratify the transaction, and take any profit arising from it, or repudiate it, and require the guardian to account.⁴²

A guardian should not mingle the ward's funds with his own, but should deposit moneys in bank in a separate account. All the authorities agree that if the guardian deposits his ward's moneys, not only in his own name, but together with funds of his own, he is liable if they are lost by a failure of the bank; and, by the weight of authority, he is so liable if he merely makes the deposit in his own name, without disclosing the true character of the fund, though there is no mingling of it with his own moneys; for he thus obtains personal credit on the appearance of owning the deposit, which is an advantage to himself from the management of the ward's moneys.⁴³ In a Maryland case, a guardian, before the failure of a bank, had deposited his ward's money in his own name, and taken certificates of deposit therefor, but he did not give notice of his fiduciary relation to the deposit. It was held that he must bear the loss of the deposit from a failure of the bank, though there was no mingling of the money with his own funds, and though he made on the certificates an indorsement that they were the property of his ward. The court

⁴¹ 1 Story, Eq. Jur. § 317; 2 Pom. Eq. Jur. 961; *Mathew v. Brise*, 14 Beav. 341; *Duke of Beaufort v. Berty*, 1 P. Wms. 703; *Gilbert v. Schwenck*, 14 Mees. & W. 488; *Wall v. Stanwick*, 34 Ch. Div. 763; *White v. Parker*, 8 Barb. (N. Y.) 48; *Pepper v. Stone*, 10 Vt. 427; *Isaacs v. Taylor*, 3 Dana (Ky.) 600.

⁴² 2 Kent, Comm. 229; *Docker v. Somes*, 2 Mylne & K. 655; *Seguin's Appeal*, 103 Pa. St. 139; *White v. Parker*, 8 Barb. (N. Y.) 48; *Kyle v. Barnett*, 17 Ala. 306; *Kennard v. Adams*, 11 B. Mon. (Ky.) 102; *Sparhawk v. Allen*, 1 Fost. (N. H.) 9; *Heard v. Daniel*, 26 Miss. 451; *Chorpenning's Appeal*, 32 Pa. St. 315.

⁴³ 2 Pom. Eq. Jur. § 1067; *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Macdonnell v. Harding*, 7 Sim. 178; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; *McAllister v. Com.*, 30 Pa. St. 536; *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274; *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. 1128; *Vaiden v. Stubblefield's Ex'r*, 28 Grat. (Va.) 153. But see *Davis v. Harman*, 21 Grat. (Va.) 194; *Parsley's Adm'r v. Martin*, 77 Va. 376.

said: "At the same time that this court feels itself bound to shield a trustee from harm in the honest and faithful discharge of his duties in his fiduciary character, it is bound studiously to exercise a vigilant care in protecting the interests of those who, from their tender years, are incapable of protecting themselves. No principle seems to be better settled than that, in such a case as this, any loss arising from a misplaced confidence in the solidity of a banking institution, or other depositories of trust property, must be borne by the trustee, and not by his cestui que trust. By making the deposit in his own name, he gained a credit with the bank, and reaped all the advantages which could be derived from the apparent ownership of the sum deposited, assuming his authority so to make such a deposit; and, having received the benefit, the law declares, and justice seems to require, that he should bear the loss. Nor is there any peculiar hardship in the establishment of such a principle, which would deter a prudent trustee from assuming upon himself the responsibilities of such a fiduciary relation, as it is at all times in his power to avoid any risk or responsibility by clothing the transaction in its true colors, and making the deposit, not in his own name, but in the name of him who is the real owner, and for whom he is trusted."⁴⁴ And, by the weight of authority, the liability of the guardian is the same in any other case where he invests his ward's funds in his own name.⁴⁵

Some of the courts have adopted a less stringent doctrine, and require some want of good faith on the part of the guardian to render him liable for a loss happening without his fault. The Virginia court has held, for instance, that the mere fact that the guardian deposits the ward's funds in his own name is not, alone, sufficient to render him liable on failure of the bank, where there is no mingling of the funds with his own, and he acts in perfect good faith, and not for his personal advantage.⁴⁶ In this case two of the five judges dissented, and the great weight of authority is against the decision.⁴⁷

⁴⁴ *Jenkins v. Walter*, 8 Gill & J. (Md.) 218.

⁴⁵ *Knowlton v. Bradley*, 17 N. H. 458; *White v. Parker*, 8 Barb. (N. Y.) 48. In *Knowlton v. Bradley*, supra, it was held that a guardian taking a note payable to himself individually, without a designation of his official capacity, cannot show, on the failure of the debtor, that it was taken for the funds of his ward. But see *Barney v. Parsons*, 54 Vt. 623.

⁴⁶ *Parsley's Adm'r v. Martin*, 77 Va. 376.

⁴⁷ See the cases in notes 43-45, supra, in many of which the facts were

A purchase by a guardian at a sale of the ward's property will be set aside, as against him, not only when he has taken an undue advantage,⁴⁸ but, by the weight of authority, even when the sale was fairly made, and for an adequate price, on the ground that a trustee will not be allowed to place himself in a position where his interests may be inconsistent with his duty.⁴⁹ "An inclination has been manifested by some of the English judges, and perhaps by some of the courts in this country, to look into the transaction, when a trustee has purchased the trust property, and to make its validity rest upon its fairness.⁵⁰ The decided weight of authority, however, is the other way. The sale may be set aside at the option of the cestui que trust, as a matter of course. * * * This is the safest rule. It removes temptation from the trustee. If he is permitted, under any circumstances, to become a purchaser of the trust estate, the deepest frauds may be cloaked under the guise of fairness, and exclude the possibility

similar to those in *Jenkins v. Walter*, *supra*. See, particularly, *Williams v. Williams*, *supra*.

⁴⁸ *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Hayward v. Ellis*, 13 Pick. (Mass.) 272; *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

⁴⁹ 2 Pom. Eq. Jur. § 481; *Cary v. Cary*, 2 Schoales & L. 173; *Ex parte James*, 8 Ves. 348; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Michoud v. Girod*, 4 How. 503; *Scott v. Freeland*, 7 Smedes & M. (Miss.) 409; *Chorpenning's Appeal*, 32 Pa. St. 315; *Morgan v. Johnson*, 68 Ill. 190; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Beal v. Harmon*, 38 Mo. 435; *Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531. To bring a case within the operation of this rule, "the relation," said the Pennsylvania court in *Chorpenning's Appeal*, *supra*, "must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exists to affect injuriously the interests of cestuis que trustent, or advance that of the trustee. The reason of the law is its life, and, unless some advantage might be gained by reason of the relation, the principle does not apply." It was therefore held in that case that a guardian may purchase the interest of his ward when the sale is made by a public officer, and is inevitable. In this case, land in which minors had an interest as heirs was sold by the sheriff under an execution against the personal representative of their ancestor, and their guardian, who had no funds of the wards, purchased at the sale. The purchase was sustained. See, also, *Prevost v. Gratz*, Fed. Cas. No. 11,406; *Fisk v. Sarber*, 6 Watts & S. (Pa.) 18.

⁵⁰ *Elrod v. Lancaster*, 2 Head (Tenn.) 571.

of proof.”⁵¹ As against a subsequent purchaser from the guardian, a different question is presented. Such sale is not void, but voidable only, and an innocent purchaser for value from the guardian would acquire a good title.⁵² If a guardian sells his own property to the ward, the rule is the same. The transaction is voidable, at the option of the ward, on attaining his majority, or before.⁵³

A purchase of a ward's property by the guardian, or a sale by the guardian of his own property to the ward, is, as stated above, merely voidable at the option of the ward. He may ratify it after attaining his majority, in which case, if he has full knowledge of his rights, and is not unduly influenced by the guardian, he cannot afterwards avoid it. And his ratification may be implied from his conduct. Thus it may be implied from an unreasonable delay in taking steps to have the transaction set aside after attaining his majority, provided he had full knowledge of his rights.⁵⁴ So, also, the receipt by the ward, on becoming of age, of the value of his property purchased by the guardian, or the use of property sold to him by his guardian, is an affirmation of the transaction, and renders it binding.⁵⁵

Right of Ward to Follow Trust Property.

The right of a cestui que trust to follow the trust estate, when wrongfully disposed of by the trustee, is thus clearly stated in Mr. Fetter's work on Equity: “Where trust property has been wrongfully disposed of by the trustee, the cestui que trust may assert his right to the specific property in two ways: (a) He may follow it into the hands of the person to whom it has been wrongfully conveyed by the trustee, unless such person is a bona fide purchaser for value without notice of the trust. (b) He may at-

⁵¹ Scott v. Freeland, *supra*.

⁵² Wyman v. Hooper, 2 Gray (Mass.) 141; Morrison v. Kinstra, 55 Miss. 71; Taylor v. Brown, 55 Mich. 482, 21 N. W. 901.

⁵³ Hendee v. Cleaveland, 54 Vt. 142.

⁵⁴ 2 Kent, Comm. 238; Scott v. Freeland, 7 Smedes & M. (Miss.) 409; Hoyt v. Sprague, 103 U. S. 613; Teipel v. Vanderweier, 36 Minn. 413, 31 N. W. 934; Cassidy v. Casey, 58 Iowa, 326, 12 N. W. 286; Sherry v. Sansberry, 3 Ind. 320; In re Wood, 71 Mo. 623; Trader v. Lowe, 45 Md. 1.

⁵⁵ Scott v. Freeland, *supra*; Caplinger v. Stokes, Meigs (Tenn.) 175.

tach and follow the property that has been substituted for the trust estate so long as the substituted property can be traced."⁵⁶

This doctrine applies to guardianship. Aside from the ward's right of action on the guardian's bond for misappropriation of trust funds, he may follow and recover the trust property, when it can be traced and identified, into whosoever hands it may come, other than purchasers for value without notice, and in whatsoever form it may take. If, for instance, a guardian invests trust funds, in his own name, in a negotiable note or other security, the ward may claim the note or other security, not only in the hands of the guardian, but also in the hands of his transferees, provided they are not purchasers for value, without notice of the character of the security, as trust property.⁵⁷ So if the guardian unlawfully purchases property, real or personal, with the funds of his ward, there is a resulting trust for the ward, "so that he may either claim a beneficial right to the property, or, at his election, claim a lien upon the property, for the security of the money invested in it; and, if the trustee sell, the purchaser from him, with notice of the trust, stands in the shoes of the trustee."⁵⁸ Guardianships are trusts, and "trusts are not only enforced against those persons who are rightfully possessed of the trust property as trustees, but against all persons who come into possession of the property bound by the trust, with notice of such trust."⁵⁹

So long as the ward's property can be identified in the hands of the guardian, in whatever form it may take, the ward is entitled to recover it, as against the guardian's creditors, in case of his insolvency or bankruptcy. Thus where a guardian invested his

⁵⁶ Fetter, Eq. 207.

⁵⁷ *Carpenter v. McBride*, 3 Fla. 292. And see *Brown v. Dunham*, 11 Gray (Mass.) 42; *Burdeau v. Davey*, 43 La. Ann. 585, 9 South. 752.

⁵⁸ *Turner v. Street*, 2 Rand. (Va.) 404; *Durling v. Hammar*, 20 N. J. Eq. 220; *Boisseau v. Boisseau*, 79 Va. 73; *Sterling v. Arnold*, 54 Ga. 690; *Armitage v. Snowden*, 41 Md. 119; *Morrison v. Kinstra*, 55 Miss. 71; *Beazley v. Harris*, 1 Bush (Ky.) 533; *Robinson v. Robinson*, 22 Iowa, 427; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543. But where a guardian purchases property on his own credit, and subsequently appropriates his ward's funds to the payment of his debt therefor, no trust arises in the ward's favor. *French v. Sheplor*, 83 Ind. 266; *Richardson v. Day*, 20 S. C. 412.

⁵⁹ *Adair v. Shaw*, 1 Schoales & L. 262.

ward's funds in a promissory note payable to his own order, and died insolvent, it was held that the ward was entitled to recover the full amount of the note from the estate.⁶⁰ But, if the property of the ward is mingled with that of the guardian in such a way that its identity is lost, the ward has no rights superior to those of general creditors.⁶¹

The ward cannot follow the trust property into the hands of purchasers for value, and without notice, but his remedy in such a case is against the guardian and his sureties.⁶² A guardian has the right to sell the personal property of his ward, if the interests of the ward require him to do so. A purchaser from the guardian has a right to presume that the guardian is acting for the benefit of the ward, and he is not obliged to see to the application of the money paid. A bona fide purchaser, therefore, of the personal property of a ward from his guardian, will be protected from claims of the ward because of the guardian's breach of trust.⁶³

Where the ward has once repudiated an unauthorized investment or disposition of the trust property, and elected to hold the

⁶⁰ *Brown v. Dunham*, 11 Gray (Mass.) 42.

⁶¹ *Covey v. Neff*, 63 Ind. 391; *Vason v. Bell*, 53 Ga. 416.

⁶² *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 151.

⁶³ A person dealing with a guardian, and acquiring property belonging to the wards from him, is not to be regarded as an innocent purchaser of the property, if the transaction was on the face of it a breach of the trust; and it can make no difference in such case that such person was not guilty of any fraudulent intent. Thus, where a guardian unlawfully (post, p. 333) used the funds of the ward to purchase real estate for the ward, without leave of court, it was held that, as the breach of trust was apparent on the face of the transaction, the vendor of the land, though he may have been innocent of any actual fraudulent intent, was to be regarded as a participant in the breach, and that he was liable for the amount received by him, with interest. *Boisseau v. Boisseau*, 79 Va. 73. So, where a person receives from a guardian, in payment of the personal debt of the guardian, money which he knows to belong to the ward, the ward may hold him liable. It will not do for him to say that he acted in good faith, for "the law stamps the transaction as fraudulent, however innocent the intention of the parties; not actual fraud in this case, but fraud in law, arising from a misapplication of trust funds." *Asberry's Adm'r v. Asberry's Adm'r*, 33 Grat. (Va.) 470.

guardian and his sureties responsible, he cannot afterwards enforce a trust against the property.⁶⁴

SAME—ACTS IN EXCESS OF AUTHORITY.

169. If a guardian exceeds his authority, though in good faith, he is liable for any resulting loss. If there is benefit instead of loss, the ward may claim the benefit.

If the guardian acts beyond the scope of his authority, although in good faith and with the best intentions, and such unauthorized transaction is detrimental to the ward, the guardian will be personally liable; but if it is beneficial to the ward the guardian will be protected, and the ward take the benefit.⁶⁵ "In equity, the dealing of guardians with the estates of their wards is watched over with a vigilant jealousy by the chancellor. And while the chancellor will often uphold and ratify contracts and arrangements made by the guardian which are for the interest of his ward, although there may be no authority or express sanction of law for the special course he may have pursued, yet, if such contract or arrangement be detrimental to the estate of the ward, it is the province and the duty of courts of equity to vacate and set it aside. It is upon a similar principle of natural justice that the infant or minor, when he attains his majority, is permitted to make his election to adopt and confirm the contracts of his guardian without authority of law in and about his

⁶⁴ Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20; Beam v. Froneberger, 75 N. C. 540; Edmonds v. Morrison, 5 Dana (Ky.) 223; Clayton v. McKinnon, 54 Tex. 206.

⁶⁵ Milner v. Harewood, 18 Ves. 259; May v. Duke, 61 Ala. 53; In re Mells, 64 Iowa, 391, 20 N. W. 486; Jackson v. Sears, 10 Johns. (N. Y.) 435; Capehart v. Huey, 1 Hill, Eq. (S. C.) 405; Eichelberger's Appeal, 4 Watts (Pa.) 81; Smith v. Dibrell, 31 Tex. 239. "It is a well-settled principle of equity that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the cestui que trust for all the gain which he has made. If he uses the trust money in speculations, dangerous, though profitable, the risk will be his own, but the profit will inure to the cestui que trust. Such a rule, though rigid, is necessary to prevent malversation." Barney v. Saunders, 16 How. 543.

estate, when they are to his advantage, and to repudiate them if he deem them injurious. If the guardian sell the land of his ward without being authorized by law, the ward has his election to accept the price, or reclaim the land, when he comes of age, no matter who has become the purchaser.”⁶⁶

SAME—DEGREE OF CARE REQUIRED.

170. A guardian is bound to exercise ordinary care and prudence, and no more, in the management of his ward's estate. .

In the management of the ward's estate, the guardian must exercise ordinary prudence and care, and such prudence and care only. If he acts as a prudent man of business would do under similar circumstances in the management of his own affairs, and a loss results, he will not be held responsible, if he has acted within the scope of his authority and in good faith.⁶⁷ For losses caused by his negligence and inexcusable management, he will be held to account.⁶⁸ Thus where a guardian received a note, as part of the property of his ward, executed by a person who had property sufficient to pay it, and failed either to obtain security for its payment, or to obtain judgment on it, though he had sufficient time and opportunity to do so, and allowed all the property of the maker, which he had assigned for the benefit of creditors, to be distributed to other creditors, it was held that he was guilty of negligence, and was liable to the ward for the amount of the note and interest thereon. “While a court,” it was said, “is always loth to surcharge a trustee with money that never came into his hands, and exacts from him only reasonable

⁶⁶ *Smith v. Dibrell*, *supra*.

⁶⁷ *Ex parte Belchier*, Amb. 218; *Speight v. Gaunt*, 9 App. Cas. 1; *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. 221; *Holeman v. Blue*, 10 Ill. App. 130; *State v. Morrison*, 68 N. C. 162; *Walker v. Walker*, 42 Ga. 135; *Barney v. Parsons' Guardian*, 54 Vt. 623; *Glover v. Glover*, 1 McMul. Eq. (S. C.) 153; *Taylor v. Hite*, 61 Mo. 142.

⁶⁸ *Kimball v. Perkins*, 130 Mass. 141; *Shurtleff v. Rile*, 140 Mass. 213, 4 N. E. 407; *Pierce v. Prescott*, 128 Mass. 140; *Royer's Appeal*, 11 Pa. St. 36; *Balthaser's Appeal*, 133 Pa. St. 338, 19 Atl. 403; *Potter v. Hiscox*, 30 Conn. 508; *Boaz's Adm'r v. Milliken*, 83 Ky. 634; *Harris v. Harrison*, 78 N. C. 202.

and ordinary care in such matters, it will not do for a guardian to utterly neglect his duties in the care and management of his ward's estate. Ordinary prudence in this instance would have saved his ward's money, and we are not measuring his responsibility by any higher standard. It is not too much to say that, had this been his own money, in all probability it would not have been lost; and he ought not to have been less vigilant in his ward's interest than he would have been in his own."⁶⁹ In another case it was said in reference to a guardian's liability for negligence: "A fiduciary relation requires vigilance as well as honesty. A dead and sluggish calm—a supine negligence—is full of peril to the minor. It is often as fatal as positive dishonesty."⁷⁰

SAME—COLLECTION AND PROTECTION OF PROPERTY—
ACTIONS.

171. It is the guardian's duty to collect and protect his ward's property of every description. To this end,

(a) **He may bring suit—**

(1) **In his ward's name generally.**

(2) **In his own name on contracts made by him as guardian.**

(b) **He may accept property in settlement of claims.**

(c) **He may compromise claims.**

(d) **He may submit to arbitration.**

In this country a guardian has the general management of the ward's estate, and acts largely according to his own discretion, and at his own risk, subject, of course, to the supervision of the court in the settlement of his accounts. His duties and powers are, in the main, those of all trustees. On his qualification as a guardian, it is his right and duty to take possession of the ward's property, of every description,⁷¹ and wherever situated.⁷² It is his duty to make every

⁶⁹ Balthaser's Appeal, *supra*.

⁷⁰ Royer's Appeal, *supra*.

⁷¹ *Pierce v. Prescott*, 128 Mass. 140. Damages recovered in an action for personal injuries should be paid to the guardian, and not to the ward's next friend. *City of Austin v. Colgate* (Tex. Civ. App.) 27 S. W. 896.

⁷² *Potter v. Hiscox*, 30 Conn. 508.

reasonable effort to reduce choses in action to possession, and to enforce any claim which the ward may have either to real or to personal property. And, of course, when it is necessary, he may maintain suits for this purpose.⁷³ A guardian will be charged with loss resulting from negligence in failing to perform these duties.⁷⁴ This is true where a guardian neglects to take steps to enforce payment of a note due his ward, or where he fails to recover possession of real estate belonging to his ward, or to enforce any other property right of his ward. "In obtaining possession of the ward's estate, as well as in its preservation and disposition, a guardian is held to the same degree of responsibility as is imposed upon executors, administrators, and trustees. It is his duty to recover all the property of his ward which comes to his knowledge, whether in possession or in action. He must use due diligence to discover its existence. He is bound to use that care and prudence which competent and faithful men em-

⁷³ *Smith v. Bean*, 8 N. H. 15; *Shepherd v. Evans*, 9 Ind. 260; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441. That a guardian may maintain replevin to recover his ward's property, see *Boruff v. Stipp*, 126 Ind. 32, 25 N. E. 865. The guardian has the same control over his action as any other suitor has. *South Bend Land Co. v. Denio*, 7 Wash. 303, 35 Pac. 64. In *Boruff v. Stipp*, supra, it was contended that a guardian could not maintain replevin to recover possession of his ward's property; that an action for this purpose should be brought by the infant's next friend, under the statute allowing him to sue by next friend. In overruling this contention, the court said: "The right of action for the possession is not necessarily in the infant, when he has a legally appointed guardian, claiming the possession and custody of the personal property. No doubt, an infant may, by his next friend, in some instances, prosecute an action for the possession of personal property; but the guardian, having the custody of the infant and the management of his estate, may also prosecute an action for the possession of personal property owned by his ward. Having the right to the control and management of the property, he must, as a necessary incident, have the right to recover possession of such property from one unlawfully retaining the possession of the same."

⁷⁴ *Caffrey v. Darby*, 6 Ves. 488; *Tebbs v. Carpenter*, 1 Madd. 290; *Balthaser's Appeal*, 133 Pa. St. 338, 19 Atl. 403 (ante, p. 327); *Caney v. Bond*, 6 Beav. 486; *Pierce v. Prescott*, 128 Mass. 140; *White v. Parker*, 8 Barb. (N. Y.) 48; *Bond v. Lockwood*, 33 Ill. 212; *Covington v. Leak*, 65 N. C. 594; *Carrillo v. McPhillips*, 55 Cal. 130; *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74; *Dodson v. McKelvey*, 93 Mich. 263, 53 N. W. 517; *Boaz's Adm'r v. Milliken*, 83 Ky. 634.

ploy in their own business. If he has knowledge of all the facts upon which the title of his ward depends, then it is a breach of duty on his part not to assert and enforce that title. It is an obligation assumed by accepting the guardianship, for the neglect of which the guardian cannot excuse himself by pleading ignorance of the law on which the rights of his ward depend. If the estate suffers loss by such ignorance, the guardian is chargeable with it, on the ground of constructive negligence."⁷⁵ Of course, if the guardian exercises ordinary prudence in his management of the estate, and is guilty of no negligence, he cannot be held liable for losses. If he exercises ordinary prudence, therefore, he will not be held liable because a claim becomes worthless, though it might have been collected when he was appointed.⁷⁶

Suits brought on behalf of the estate should ordinarily be in the ward's name,⁷⁷ but the prevailing rule is that, on a contract made by the guardian in the course of the management of the estate, he should sue in his own name.⁷⁸ In the exercise of a proper discretion he may accept real or personal property in settlement of a claim,⁷⁹ but he cannot ordinarily accept payment for less than the full amount of an enforceable debt.⁸⁰ It would be otherwise if in the exercise of good faith, and to save expense.⁸¹ A guardian may also compromise claims against the ward's estate, and a submission to arbitration by him is authorized, and will be binding.⁸²

⁷⁵ *Pierce v. Prescott*, 128 Mass. 140.

⁷⁶ *Stem's Appeal*, 5 Whart. (Pa.) 472; *Waring v. Darnall*, 10 Gill & J. (Md.) 127; *Love v. Logan*, 69 N. C. 70; ante, p. 326.

⁷⁷ *Hutchins v. Dresser*, 26 Me. 76; *Vincent v. Starks*, 45 Wis. 458; *Sillings v. Bumgardner*, 9 Grat. (Va.) 273; *Bradley v. Amidon*, 10 Paige (N. Y.) 235; *Riggs v. Zaleski*, 44 Conn. 120; *Perine v. Grand Lodge*, 48 Minn. 82, 50 N. W. 1022; *Dennison v. Willcut* (Idaho) 35 Pac. 698; *Longstreet v. Tilton*, 1 N. J. Law, 38.

⁷⁸ *Pond v. Curtiss*, 7 Wend. (N. Y.) 45; *Thomas v. Bennett*, 56 Barb. (N. Y.) 197; *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, and 12 N. W. 381; *Hightower v. Maull*, 50 Ala. 495; *Sainsevain v. Luce* (Cal.) 35 Pac. 1033.

⁷⁹ *Mason v. Buchanan*, 62 Ala. 110.

⁸⁰ *Darby v. Stribling*, 22 S. C. 243.

⁸¹ *Blue v. Marshall*, 3 P. Wms. 381; *Torry v. Black*, 58 N. Y. 185; *Ordinary v. Dean*, 44 N. J. Law, 64.

⁸² *Weston v. Stuart*, 11 Me. 326; *Hutchins v. Johnson*, 12 Conn. 376; *Weed*

Where suit is reasonably brought by a guardian to recover or protect his ward's property, his expenses for attorney's fees and costs will be allowed out of the ward's estate.⁸³ Allowance will also be made for reasonable counsel fees paid for advice in the management of the trust, and for legal services rendered in any litigation concerning the ward's estate.⁸⁴ But the guardian cannot charge his ward with attorney's fees made necessary by his own negligence.⁸⁵

SAME—INVESTMENTS.

172. A guardian must invest his ward's funds within a reasonable time; and if he fails to do so he will be charged interest, or, in case of gross delinquency, compound interest.

173. He cannot invest money on the credit of individuals or firms, nor, in some states, in stock in corporations, nor can he convert personalty into real estate, without leave of court, but generally he is only called upon to use the care of a prudent man of business.

It is the duty of the guardian, as soon as it can reasonably be done to advantage, to invest his ward's funds in productive securities. He is usually allowed six months for this purpose, and

v. Ellis, 3 Caines (N. Y.) 253; *Goleman v. Turner*, 14 Smedes & M. (Miss.) 118; *Strong v. Beroujon*, 18 Ala. 168; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317; *Jones v. Bond*, 76 Ga. 517. But not where the interests of the guardian and ward are antagonistic. *Fortune v. Killebrew*, 86 Tex. 172, 23 S. W. 976.

⁸³ *In re Flinn*, 31 N. J. Eq. 640; *Alexander's Adm'r v. Alexander*, 5 Ala. 517; *Bickerstaff v. Marlin*, 60 Miss. 509; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441. And so, also, for defending suits. *Mathes v. Bennett*, 1 Post (N. H.) 204.

⁸⁴ *Voessing v. Voessing*, 4 Redf. Sur. (N. Y.) 360; *State v. Foy*, 65 N. C. 265; *Moore v. Shields*, 69 N. C. 50; *Alexander v. Alexander*, 8 Ala. 796; *Caldwell v. Young*, 21 Tex. 800. Also for clerk hire. *McWhorter v. Benson*, *Hopk. Ch. (N. Y.)* 28; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287.

⁸⁵ *Rawson v. Corbett*, 43 Ill. App. 127.

where he unreasonably delays he will be charged interest.⁸⁶ Where the guardian uses the ward's money in his business, or otherwise converts it to his own use, or is guilty of gross delinquency in his failure to invest, he will be charged with compound interest.⁸⁷

The authorities as to the character of the investments which a guardian or other trustee is authorized to make are not in accord. Investments are allowed in some states which are not allowed in others. "The general rule is everywhere recognized, that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs."⁸⁸ In some jurisdictions no attempt has been made to establish a more definite rule.⁸⁹ In others the discretion has been confined by the legislature or the courts within strict limits.

Prior to the Declaration of Independence the court of chancery in England allowed considerable latitude to guardians and other trustees in the investment of trust funds. They could invest, not only in public funds and real-estate securities, but also

⁸⁶ 2 Kent, Comm. 231; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Worrell's Appeal*, 23 Pa. St. 44; *Karr's Adm'r v. Karr*, 6 Dana (Ky.) 3; *White v. Parker*, 8 Barb. (N. Y.) 48; *Dunscomb v. Dunscomb*, 1 Johns. Ch. (N. Y.) 508; *Owen v. Peebles*, 42 Ala. 338; *Pettus v. Sutton*, 10 Rich. Eq. (S. C.) 356; *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950; *Armstrong's Heirs v. Walkup*, 12 Grat. (Va.) 608; *Barney v. Saunders*, 16 How. 535; *Rawson v. Corbett*, 43 Ill. App. 127. No interest will be charged on what is kept on hand for ordinary current expenses. *Knowlton v. Bradley*, 17 N. H. 458; *Baker's Appeal*, 8 Serg. & R. (Pa.) 12.

⁸⁷ 2 Kent, Comm. 231; *Farwell v. Steen*, 46 Vt. 678; *Swindall v. Swindall*, 8 Ired. Eq. (N. C.) 285; *Stark v. Gamble*, 43 N. H. 465; *Clay v. Clay*, 3 Mete. (Ky.) 548; *Snively v. Harkrader*, 29 Grat. (Va.) 112; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Barney v. Saunders*, 16 How. 535; *Hughes v. People*, 111 Ill. 457; *In re Eschrich*, 85 Cal. 98, 24 Pac. 634.

⁸⁸ *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. 221.

⁸⁹ *Lamar v. Micou*, *supra* (collecting authorities); *Boggs v. Adger*, 4 Rich. Eq. (S. C.) 408, 411; *Brown v. Wright*, 39 Ga. 96; *Foscue v. Lyon*, 55 Ala. 440; *Brown v. Campbell*, Hopk. Ch. (N. Y.) 233; *Harvard College v. Amory*, 9 Pick. (Mass.) 446, 461; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 119; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262.

in stock in private corporations.⁹¹ They could not, however, by the weight of authority, invest in a mere personal obligation, like a promissory note, without other than private security.⁹² Later the court limited trust investments to the public funds, and excluded investments in bank stock, or other corporate stock, or in mortgages of real estate. In this state of the law, parliament passed acts, and orders in chancery were made pursuant thereto, authorizing trustees to invest in stock of the Bank of England or of Ireland, or upon real-estate securities, as well as in the public funds.⁹³

In this country the courts are not entirely agreed as to what are to be deemed proper investments by a guardian or other trustee. In some states the question is regulated by statute. Perhaps in all the states he is authorized to invest in public or real securities, like government bonds and real-estate mortgages.⁹⁴ Perhaps in most states he may invest in stock in corporations, like railroad and bank stock.⁹⁵ In some states such an investment is not authorized.⁹⁶ By the great weight of authority, guardians and the sureties on their bonds are responsible for losses occur-

⁹¹ *Jackson v. Jackson*, 1 Atk. 513, 514.

⁹² *Ryder v. Bickerton*, 3 Swanst. 80, note; *Adye v. Feuilleateau*, 1 Cox, Ch. 24; *Holmes v. Dring*, 2 Cox, Ch. 1; *Powell v. Evans*, 5 Ves. 839. But see *Knight v. Plimouth*, 3 Atk. 480; *Harden v. Parsons*, 1 Eden, 145.

⁹³ *Lamar v. Micou*, *supra*.

⁹⁴ *Gray v. Fox*, 1 N. J. Eq. 259; *Worrell's Appeal*, 9 Pa. St. 508; *Nance v. Nance*, 1 S. C. 209; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238.

⁹⁵ *Lovell v. Minot*, 20 Pick. (Mass.) 116; *Harvard College v. Amory*, 9 Pick. (Mass.) 446, 461; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262; *Smyth v. Burns' Adm'rs*, 25 Miss. 422; *Hammond v. Hammond*, 2 Bland (Md.) 306; *Gray v. Lynch*, 8 Gill (Md.) 403; *Murray v. Feinour*, 2 Md. Ch. 418; *Boggs v. Adger*, 4 Rich. Eq. (S. C.) 408; *Haddock v. Bank*, 66 Ga. 496; *Fidelity Trust & Safety Vault Co. v. Glover* (Ky.) 14 S. W. 343; *Durett v. Com.*, Id. 189. Where corporate stock is held a good investment, a guardian may invest in a note secured by such stock. *Lovell v. Minot*, *supra*.

⁹⁶ In many states the rule is against such an investment. In a New York case it was said: "It is not denied that the employment of the fund, as a capital in trade, would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a co-partnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it. The moment the fund is invested in bank or insurance or rail-

ring through unsecured, or insufficiently secured, loans or investments made on the credit of individuals or firms, however solvent the individual or firm may be when the loan or investment is made,—mere personal security not being deemed sufficient.⁹⁷ And it is well settled that a guardian has no authority to subject his ward's estate to the hazards of trade, and that if he does so, and a loss, instead of a profit, results, he and his sureties will be responsible.⁹⁸

A guardian cannot, without leave of court first obtained, convert personalty into real estate, as by investing his ward's funds in the purchase of land.⁹⁹ Nor can he erect buildings on land of the ward, or make permanent additions to buildings already thereon.¹⁰⁰ But he may pay taxes and incumbrances from the

road stock, it has left the control of the trustees. Its safety and the hazard or risk of loss is no longer dependent upon their skill, care, or discretion in its custody or management; and the terms of the investment do not contemplate that it ever will be returned to the trustees." *King v. Talbot*, 40 N. Y. 76. And see *Worrell's Appeal*, 9 Pa. St. 508; *Allen v. Gaillard*, 1 S. C. 279; *French v. Currier*, 47 N. H. 88; *Gray v. Fox*, 1 N. J. Eq. 259, 268; *Halsted v. Meeker's Ex'rs*, 18 N. J. Eq. 136; *Lathrop v. Smalley's Ex'rs*, 23 N. J. Eq. 192; *Ihmsen's Appeal*, 43 Pa. St. 431; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238.

⁹⁷ *Clark v. Garfield*, 8 Allen (Mass.) 427; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *Gray v. Fox*, 1 N. J. Eq. 259; *Clay v. Clay*, 3 Mete. (Ky.) 548; *Covington v. Leak*, 65 N. C. 594; *Boyett v. Hurst*, 1 Jones, Eq. (N. C.) 166. But see *Konigmacher v. Kimmel*, 1 Pen. & W. (Pa.) 207. In North Carolina it seems that an investment in a note with sureties is good. *Covington v. Leak*, 65 N. C. 594. And in some states investments in the unsecured personal obligation of an individual or firm have been sustained. See *Foscue v. Lyon*, 55 Ala. 440, 452. Money placed temporarily in bank at interest, though it can only be withdrawn on two weeks' notice, is not an investment; and, if the bank is in good repute, the guardian will not be liable if it subsequently fails. *Law's Estate*, 144 Pa. St. 499, 22 Atl. 831. It is otherwise where money is invested in a certificate of deposit of a bank in another state. Such an investment is at the guardian's risk. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653.

⁹⁸ *Martin v. Davis*, 80 Wis. 376, 50 N. W. 171; *Michael v. Locke*, 80 Mo. 548; *Corcoran v. Allen*, 11 R. I. 567. See *Hoyt v. Sprague*, 103 U. S. 613.

⁹⁹ 2 Kent, Comm. 230; *Perry, Trusts*, §§ 605, 606; *Witter v. Witter*, 3 P. Wms. 99; *Ware v. Polhill*, 11 Ves. 257; *Royer's Appeal*, 11 Pa. St. 36; *Woods v. Boots*, 60 Mo. 546; *Boisseau v. Boisseau*, 79 Va. 73; *Skelton v. Ordinary*, 32 Ga. 266.

¹⁰⁰ *Murphy v. Walker*, 131 Mass. 341; *In re Miller's Estate*, 1 Pa. St. 326; *Snodgrass' Appeal*, 37 Pa. St. 377; *Hassard v. Rowe*, 11 Barb. (N. Y.) 22;

income of the estate, when necessary for the preservation of the property, and he will be reimbursed therefor, though he has acted without the previous sanction of the court.¹⁰¹

When the matter is not regulated by statute, or settled by judicial precedent in the particular jurisdiction, a guardian will generally be protected where he uses such care as would be exercised by a prudent man of business in selecting a security for an investment, and not for speculation.¹⁰² "If a trustee acts with good faith, and a sound discretion, in the investment of trust funds, he is not to be held responsible for any loss which may happen."¹⁰³ "All that can be required of a trustee to invest is that he shall conduct himself faithfully, and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of the capital to be invested."¹⁰⁴ When a guardian is appointed in a state which is not his ward's domicile, he should not, in accounting for his investments, be held to a narrower range of securities than is allowed by the law of his domicile.¹⁰⁵

Copley v. O'Niel, 39 How. Prac. (N. Y.) 41; Green v. Winter, 1 Johns. Ch. (N. Y.) 26; Cheney v. Roodhouse, 135 Ill. 257, 25 N. E. 1019; Payne v. Stone, 7 Smedes & M. (Miss.) 367. But see May v. May, 109 Mass. 257, where the cost of a building erected for use, and not for an investment, was allowed the guardian of an insane ward, the court saying: "It could not be said to be an unreasonable expenditure for a man of like fortune and circumstances, not under guardianship; and we think the fact of guardianship furnishes no sufficient ground, in the present case, for its disallowance."

¹⁰¹ Wright v. Comley, 14 Ill. App. 551; March v. Bennett, 1 Vern. 428; Waters v. Ebrall, 2 Vern. 606.

¹⁰² Clark v. Garfield, 8 Allen (Mass.) 427; Harvard College v. Amory, 9 Pick. (Mass.) 446; Lovell v. Minot, 20 Pick. (Mass.) 116; Konigsmacher v. Kimmel, 1 Pen. & W. 207; King v. Talbot, 40 N. Y. 76; Nance v. Nance, 1 S. C. 209; Jack's Appeal, 94 Pa. St. 367; Gary v. Cannon, 3 Ired. Eq. (N. C.) 64.

¹⁰³ Clark v. Garfield, *supra*.

¹⁰⁴ Harvard College v. Amory, *supra*.

¹⁰⁵ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221; *Id.*, 114 U. S. 218, 5 Sup. Ct. 857.

SAME—CARE OF REAL ESTATE.

174. A guardian must lease his ward's lands, keep the buildings in repair, and collect the rents. But he has no authority to allow any use of the lands which would amount to waste.

The guardian may lease his ward's lands, and it is his duty to do so,¹⁰⁶ and to collect the rents therefrom.¹⁰⁷ His authority to lease extends only for the term of the ward's minority, and a lease for a longer time may be avoided by the ward on becoming of age.¹⁰⁸ The guardian's control over the ward's land extends only to the use of the same. It has been held that he may cut growing timber, when such use does not amount to waste.¹⁰⁹ But, since he cannot dispose of his ward's real estate without an order of court, his lease of mineral lands for development, being a grant of part of the corpus of the land, would be without authority.¹¹⁰ If the guardian occupies the ward's land himself, he will be liable for rent,¹¹¹ as well as for any depreciation caused by improper cultivation.¹¹² He must keep all buildings in repair, if the income of the estate is sufficient, and for loss of rent occurring from neglect so to do,¹¹³ as well as for injury thereby resulting to the property,¹¹⁴ he will be liable.

¹⁰⁶ *Rex v. Oakley*, 10 East, 494; *Emerson v. Spicer*, 46 N. Y. 594; *Richardson v. Richardson*, 49 Mo. 29; *Hughes' Minors' Appeal*, 53 Pa. St. 500; *Wills' Appeal*, 22 Pa. St. 329; *Palmer v. Cheseboro*, 55 Conn. 114, 10 Atl. 508; *Clark v. Burnside*, 15 Ill. 62. By statute, in some states, he must first obtain leave of court. See *Alexander v. Buffington*, 66 Iowa, 360, 23 N. W. 754.

¹⁰⁷ *Wills' Appeal*, 22 Pa. St. 329; *Bond v. Lockwood*, 33 Ill. 212.

¹⁰⁸ *Emerson v. Spicer*, 46 N. Y. 594.

¹⁰⁹ *Thompson v. Boardman*, 1 Vt. 367; *Bond v. Lockwood*, 33 Ill. 212; *Torry v. Black*, 58 N. Y. 185.

¹¹⁰ *Stoughton's Appeal*, 88 Pa. St. 198. And see *Williams' Case*, 3 Bland (Md.) 186.

¹¹¹ *In re Otis*, 34 Hun (N. Y.) 542; *Royston v. Royston*, 29 Ga. 82; *Willis v. Fox*, 25 Wis. 646; *In re Tyler*, 40 Mo. App. 378.

¹¹² *Willis v. Fox*, 25 Wis. 646.

¹¹³ *Smith v. Gummere*, 39 N. J. Eq. 27.

¹¹⁴ *Willis v. Fox*, 25 Wis. 646.

SAME—SALE OF REAL ESTATE.

175. By statute, guardians, on obtaining license from the court, are generally empowered to sell their wards' lands to pay debts, or for future maintenance and expenses, where there is not sufficient personal property, and in some states for the purpose of making more advantageous investments.¹¹⁵

176. Sales without license from the court are void, and the same is true where the court granting the license had no jurisdiction. Sales made in pursuance of a license from a court having jurisdiction, though irregular, cannot be collaterally attacked.

Some of the courts have held that a court of chancery, as the general guardian of infants within its jurisdiction, has an inherent power to decree a sale of their real estate whenever it is for their advantage to do so,¹¹⁶ but the weight of authority is to the contrary.¹¹⁷ In most states, by statute, such power has been expressly conferred, subject to certain restrictions, either upon the court of chancery, or upon the probate or other similar court. In some states power is given to mortgage the estate, under certain circumstances. The statutes usually authorize sales where the personal property is insufficient to pay the debts of the ward's estate, and to provide for his future support and education and for the expenses of caring for his property,¹¹⁸ and sometimes sales are authorized in order to make more advantageous investments.

¹¹⁵ As to purchase by guardian at sales of his ward's property, see ante, p. 321.

¹¹⁶ In re Salisbury, 3 Johns. Ch. (N. Y.) 347; Huger v. Huger, 3 Desaus. Eq. (S. C.) 18; Stapleton v. Langstaff, Id. 22; Williams v. Harrington, 11 Ired. (N. C.) 616; Ex parte Jewett, 16 Ala. 409; Goodman v. Winter, 64 Ala. 410.

¹¹⁷ Taylor v. Philips, 2 Ves. Sr. 23; Calvert v. Godfrey, 6 Beav. 97; Field v. Moore, 25 Law J. Ch. 66; Rogers v. Dill, 6 Hill (N. Y.) 415; Baker v. Lorillard, 4 N. Y. 257; Williams' Case, 3 Bland (Md.) 186 (but see Roche v. Waters, 72 Md. 264, 19 Atl. 535); Pierce's Adm'r v. Trigg's Heirs, 10 Leigh (Va.) 406; Faulkner v. Davis, 18 Grat. (Va.) 651.

¹¹⁸ Faulkner v. Davis, 18 Grat. (Va.) 651.

The contract of a guardian to sell his ward's real estate, or a sale and conveyance thereof by him, without an order of court, is an absolute nullity, for a guardian has no authority to dispose of the real estate of his ward, unless by order of court.¹¹⁹ "An instrument conveying land of minors, signed by one representing himself to be their guardian, is wholly inoperative without the production of the precedent orders of a court of competent jurisdiction in the premises, and therefore inadmissible as evidence against them. Courts will not presume the existence of authority to act, in such cases, in the absence of all proof of the existence of the power, and its loss or destruction, even after the lapse of thirty years."¹²⁰ An order of the court being necessary to authorize a guardian to sell and convey his ward's real estate, it follows that the sale and conveyance must be in strict compliance with the order; otherwise it is just as much without authority as if there were no order of court at all.¹²¹ Unless it is otherwise provided by statute, the court cannot authorize a natural guardian, as such, to dispose of his ward's real estate. The guardian must be a duly-appointed guardian of the ward's estate, and he must have qualified as such.¹²² And, a fortiori, the court cannot authorize a sale by some third person.¹²³

A sale made under the order of a court having no jurisdiction in the premises is an absolute nullity, and may be attacked in any way and at any time. But when the court has jurisdiction a sale made in pursuance of its license cannot be attacked collaterally for irregularities. The courts do not agree as to what requirements of the statutes are jurisdictional. The provision of the statutes in the various states are generally uniform in requiring the guardian to execute a special bond binding him to make the sale honestly, and to account

¹¹⁹ *Worth v. Curtis*, 15 Me. 228; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271; *Morrison v. Kinstra*, 55 Miss. 71; *Gaylord v. Stebbins*, 4 Kan. 42; *Downing v. Peabody*, 56 Ga. 40; *Ex parte Kirkman*, 3 Head (Tenn.) 517; *Mason v. Wait*, 4 Scam. (Ill.) 127; *Wells v. Chaffin*, 60 Ga. 677; *House v. Brent*, 69 Tex. 27, 7 S. W. 65; *Shamleffer v. Mill Co.*, 18 Kan. 24; *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82.

¹²⁰ *House v. Brent*, *supra*.

¹²¹ *Cox v. Manvel*, 56 Minn. 358, 57 N. W. 1062.

¹²² *Shanks v. Seamonds*, 24 Iowa, 131; *Myers v. McGavock*, 39 Neb. 843, 58 S. W. 522.

¹²³ *Paty v. Smith*, 50 Cal. 153; *McKee v. Thomas*, 9 Kan. 343.

for the application of the proceeds in accordance with the objects for which the license was granted. In most states failure to give the bond is held to be jurisdictional, and to render the sale absolutely void,¹²⁴ but in some states it is held that such a failure will not render the sale open to attack in a collateral proceeding.¹²⁵ The same variance exists in the decisions of the different states as to the necessity of giving notice to the ward. By the weight of authority, such notice is held not to be jurisdictional, on the theory that the proceeding is purely in rem.¹²⁶ The court of a county where a ward has real estate may license a foreign guardian to sell, when he has complied with the state laws regarding foreign guardians, though the ward is a nonresident.¹²⁷

SAME—SALE OF PERSONAL PROPERTY.

177. A guardian may sell his ward's personal property without leave of court.

It is within the scope of the guardian's authority to sell his ward's personal property without first obtaining leave of court,¹²⁸ except

¹²⁴ *Williams v. Morton*, 38 Me. 47; *Blauser v. Diehl*, 90 Pa. St. 350; *Stewart v. Bailey*, 28 Mich. 251; *McKeever v. Ball*, 71 Ind. 398; *Barnett v. Bull*, 81 Ky. 127; *Vanderburg v. Williamson*, 52 Miss. 233.

¹²⁵ *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Watts v. Cook*, 24 Kan. 278; *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, and 12 N. W. 381; *Bunce v. Bunce*, 59 Iowa, 533, 13 N. W. 705.

¹²⁶ *Mohr v. Manierre*, 101 U. S. 417; *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037; *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674; *Williams v. Williams*, 18 Ind. 345; *Doe v. Jackson*, 51 Ala. 514; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 526; *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364; *Mason v. Walt*, 4 Scam. (Ill.) 127; *Mulford v. Beveridge*, 78 Ill. 455; *Spring v. Kane*, 86 Ill. 580. But see *Musgrave v. Conover*, 85 Ill. 374. Contra, *Rule v. Broach*, 58 Miss. 552; *Rankin v. Miller*, 43 Iowa, 11; *Mohr v. Tulip*, 40 Wis. 66 (overruled by *Mohr v. Porter*, *supra*).

¹²⁷ *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522; *Bouldin v. Miller* (Tex. Civ. App.) 26 S. W. 133.

¹²⁸ 2 Kent, Comm. 228; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Ellis v. Proprietors*, 2 Pick. (Mass.) 243; *Hunter v. Lawrence's Adm'r*, 11 Grat. (Va.) 111; *Humphrey v. Buisson*, 19 Minn. 221 (Gil. 182); *Wallace v. Holmes*, 9

when he is restricted by some statutory provision. A guardian ought not to sell his ward's personal property unless the proceeds are needed for the due execution of the trust, or unless he can, by the sale, produce some advantage to the estate. Even where he sells it improperly, however, the purchaser will acquire a good title, if there is innocence and good faith on his part. "Having the power [to sell] without obtaining any special license or authority, a title under him, acquired bona fide by the purchaser, will be good; for the purchaser cannot know whether the power has been executed with discretion or not, and the estate is always supposed to be secure by the bond given by the guardian for the faithful execution of his trust, and discreet management of the property."¹²⁹

SAME—POWER TO EXECUTE INSTRUMENTS.

178. Guardians can execute all instruments which are necessary in the scope of their trust, but cannot bind the ward or his estate by covenants.

Guardians have authority to execute all instruments which are necessary, within the scope of the trust. Thus, when a guardian has been authorized by court to sell real estate, he may execute a conveyance of the same.¹³⁰ His authority is limited, however, to the transfer of the title. He cannot bind his ward by covenants, but will be personally bound by any covenants therein contained.¹³¹ A guardian, on receiving payment of a mortgage, has authority to discharge it of record.¹³² He can make a binding contract for the ex-

Blatchf. 67, Fed. Cas. No. 17,100. The rule is otherwise in some states as to real-estate mortgages. *McDuffie v. McIntyre*, 11 S. C. 551.

¹²⁹ *Ellis v. Proprietors*, supra. And see the other cases above cited.

¹³⁰ *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *State v. Clark*, 28 Ind. 138; *Byrd v. Turpin*, 62 Ga. 591; *Young v. Lorain*, 11 Ill. 625.

¹³¹ *Whiting v. Dewey*, supra; *Young v. Lorain*, supra; *Holyoke v. Clark*, 54 N. H. 578. But no implied covenants arise in a lease by a guardian. *Webster v. Conley*, 46 Ill. 13.

¹³² *Chapman v. Tibbits*, 33 N. Y. 289; *Riddell v. Vizard*, 35 La. Ann. 310; *Perkins v. Dyer*, 6 Ga. 401. Contra, *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263, 27 S. W. 151. But a mortgage given by a guardian to his ward cannot be satisfied by the guardian without authority of court, and payment of the debt. *Jennings v. Jennings*, 104 Cal. 150, 37 Pac. 794.

tension of the mortgage,¹³³ or assign it,¹³⁴ and, on breach of condition, may foreclose.¹³⁵

FOREIGN GUARDIANS.

179. A guardian's authority is strictly territorial, but foreign guardians are recognized, in most states, as a matter of comity, on compliance with certain statutory regulations.

The authority of a guardian is confined to the county or state of his appointment. His rights are strictly territorial, and unless his appointment is recognized, as a matter of comity, by a sister state or foreign country, he has no extraterritorial rights in regard to the person or property of his ward.¹³⁶ The authority of a foreign guardian is sometimes recognized, as a matter of comity,¹³⁷ and if a new appointment is required the claims of the foreign guardian to the office will generally be respected.¹³⁸ In many states there are statutory regulations authorizing a foreign guardian to act on complying with certain regulations, such as filing a certified copy of his appointment, or the giving of a bond, and in some states he must first take out ancillary letters of guardian-

¹³³ *Willick v. Taggart*, 17 Hun (N. Y.) 511.

¹³⁴ *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Humphrey v. Bulsson*, 19 Minn. 221 (Gil. 182). Contra, *Mack v. Brammer*, 28 Ohio St. 508.

¹³⁵ *Taylor v. Hite*, 61 Mo. 142. A guardian has authority to redeem from a foreclosure. *Marvin v. Schilling*, 12 Mich. 356.

¹³⁶ *Story*, Conf. Laws, §§ 492-529; *Whart. Conf. Laws*, §§ 209-268; *Ex parte Watkins*, 2 Ves. Sr. 470; *Hoyt v. Sprague*, 103 U. S. 613; *Rice's Case*, 42 Mich. 528, 4 N. W. 284; *Weller v. Suggett*, 3 Redf. Sur. (N. Y.) 249; *McLoskey v. Reid*, 4 Bradf. Sur. (N. Y.) 334; *Rogers v. McLean*, 31 Barb. 304 (but see *Freund v. Washburn*, 17 Hun, 543); *Kraft v. Wickey*, 4 Gill & J. (Md.) 332; *Leonard v. Putnam*, 51 N. H. 247; *Grist v. Forehand*, 36 Miss. 69; *Burnet v. Burnet*, 12 B. Mon. (Ky.) 323; *In re Nickals*, 21 Nev. 462, 34 Pac. 250.

¹³⁷ *Savini v. Lousada*, 22 Law T. (N. S.) 61; *Nugent v. Vetзера*, L. R. 2 Eq. 704; *Stuart v. Bute*, 9 H. L. Cas. 440; *Woodworth v. Spring*, 4 Allen, 321; *Earl v. Dresser*, 30 Ind. 11; *Marts v. Brown*, 56 Ind. 386; *Wells v. Andrews*, 60 Miss. 873; *Sims v. Renwick*, 25 Ga. 58.

¹³⁸ *Rice's Case*, 42 Mich. 528, 4 N. W. 284; *Hoyt v. Sprague*, 103 U. S. 613; *Watt v. Allgood*, 62 Miss. 38.

ship. An ancillary guardian is not bound to account in the foreign state for funds received there, but should render his account to the court of his original appointment.¹⁸⁹

INVENTORY AND ACCOUNTS.

180. Guardians must file an inventory of the estate, and account from time to time, and, at the expiration of the guardianship, must render a final account.

181. A final account, when settled and allowed by the court, can only be questioned in a direct proceeding on the ground of fraud or mistake.

182. When the same person is executor or administrator and guardian, he is liable primarily, as executor or administrator, for funds in his hands due his ward as legatee or distributee, but becomes liable as guardian on charging himself in that capacity.

It is the duty of the guardian to file an inventory of the property of the estate, prepared by disinterested persons, and to render accounts, from time to time, usually annually. Neither the inventory¹⁴⁰ nor such accounts¹⁴¹ are conclusive as to the facts therein set forth, but are *prima facie* correct, as against the guardian and his sureties,¹⁴² or against any one else who disputes their correctness.¹⁴³ At the expiration of his term of office the guardian must, in accordance with his general duty, as well, usually, as by the express provisions of his bond, render a final account,

¹⁸⁹ *Smoot v. Bell*, 3 Cranch, C. C. 343, Fed. Cas. No. 13,132.

¹⁴⁰ *Bourne v. Maybin*, 3 Woods, 724, Fed. Cas. No. 1,700; *State v. Stewart*, 36 Miss. 652; *Green v. Johnson*, 3 Gill & J. (Md.) 389.

¹⁴¹ *Douglas' Appeal*, 82 Pa. St. 169; *Prindle v. Holcomb*, 45 Conn. 111; *Guardianship of Cardwell*, 55 Cal. 137; *Diaper v. Anderson*, 37 Barb. (N. Y.) 168.

¹⁴² *Davis v. Combs*, 38 N. J. Eq. 473; *State v. Jones*, 89 Mo. 470, 1 S. W. 355; *Bond v. Lockwood*, 33 Ill. 212; *State v. Stewart*, 36 Miss. 652; *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249; *In re Heath's Estate*, 58 Iowa, 36, 11 N. W. 723; and cases cited in notes 140 and 141, *supra*.

¹⁴³ *Coggins v. Flythe*, 113 N. C. 102, 18 S. E. 96.

and he may be brought into court for that purpose.¹⁴⁴ This account, when settled and allowed by the court, is, by the weight of authority, conclusive, as against all parties,¹⁴⁵ when attacked collaterally, and can only be questioned in a direct proceeding brought for that purpose, on the ground of fraud or mistake.¹⁴⁶

When a person is both executor or administrator and guardian, and receives funds to which his ward is entitled as legatee or distributee, he is not liable in both capacities at once.¹⁴⁷ He must primarily account for such funds as executor or administrator, and remains liable as such until a settlement in such capacity, in which he is credited with the funds as executor or administrator, and charged as guardian.¹⁴⁸ But after the expiration of a reasonable time, sometimes determined by the time limited by law for the settlement of estates, it will be presumed that he has transferred the funds, and holds them in his capacity as guardian.¹⁴⁹

¹⁴⁴ *Gilbert v. Guptill*, 34 Ill. 112; *Walls' Appeal*, 104 Pa. St. 14; *Say's Ex'rs v. Barnes*, 4 Serg. & R. (Pa.) 112; *Wade v. Lobdell*, 4 Cush. (Mass.) 510; *Stark v. Gamble*, 43 N. H. 465.

¹⁴⁵ *Allman v. Owen*, 31 Ala. 167; *McCleary v. Menke*, 109 Ill. 294; *Candy v. Hanmore*, 76 Ind. 125; *State v. Leslie*, 83 Mo. 60; *King v. King*, 40 Iowa, 120; *Brodrig v. Brodrig*, 56 Cal. 563. *Contra*, *Henley v. Robb*, 86 Tenn. 474, 7 S. W. 190; *Campbell v. Williams*, 3 T. B. Mon. (Ky.) 122; *Bourne v. Maybin*, 3 Wood, 724, Fed. Cas. No. 1,700; *State v. Miller*, 44 Mo. App. 118.

¹⁴⁶ *Cummings v. Cummings*, 128 Mass. 532; *State v. Leslie*, 83 Mo. 60; *Reed v. Ryburn*, 23 Ark. 47; *McDow v. Brown*, 2 S. C. 95; *Yeager's Appeal*, 34 Pa. St. 173.

¹⁴⁷ *Wren v. Gayden*, 1 How. (Miss.) 365. But, in case of his failure to duly collect such funds as guardian, the sureties on his bond as guardian may also become liable therefor. *Harris v. Harrison*, 78 N. C. 202.

¹⁴⁸ *Conkey v. Dickinson*, 13 Mete. (Mass.) 51; *Burton v. Tunnell*, 4 Har. (Del.) 424; *Alston v. Munford*, 1 Brock. 266, Fed. Cas. No. 267; *Weaver v. Thornton*, 63 Ga. 655. His liability as guardian has been held to arise from the time he charged himself as such, without obtaining any order of court, or making a formal settlement. *In re Scott's Account*, 36 Vt. 297. And see *In re Brown*, 72 Hun, 160, 25 N. Y. Supp. 694; *State v. Branch*, 112 Mo. 661, 20 S. W. 693. Where a legacy is payable at a future date, the executor cannot render the sureties on his bond as guardian liable by prematurely charging himself as guardian. *Swope v. Chambers*, 2 Grat. (Va.) 319.

¹⁴⁹ *Watkins' Adm'rs v. State*, 2 Gill & J. (Md.) 220; *Karr's Adm'r v. Karr*, 6 Dana (Ky.) 3; *Townsend v. Tallant*, 33 Cal. 45; *In re Wood*, 71 Mo. 623; *Johnson v. Johnson*, 2 Hill, Eq. (S. C.) 277; *Wilson v. Wilson*, 17 Ohio St. 150.

Such presumption may be rebutted where the question arises as to liability on his executor's or administrator's bond.¹⁵⁰ The intention to charge himself as guardian may be inferred from his acts in regard to the property in his hands.¹⁵¹

COMPENSATION OF GUARDIAN.

183. When a guardian has faithfully executed his trust, but not otherwise, he will be allowed compensation for his services, in the settlement of his accounts.

In England guardians receive no compensation for their services, but in this country the rule is otherwise. The rules are different in the various states, but ordinarily guardians receive a certain percentage or commission on receipts and disbursements, the rate being established either by statute or by the court. In some states no regular percentage is established, but the court allows what is reasonable.¹⁵² For any specific services rendered by the guardian, apart from the general management of the estate, a reasonable allowance in addition to his percentage will ordinarily be made, to be determined by the importance and difficulty of the services.¹⁵³ But compensation in the nature of a commission on reinvestments of money and repairs has been refused on the ground that it is in conflict with the true nature and purpose of the trust that the guardian should be a gainer by increasing the amount of expenditures through frequent changes of investments, or by repairs.¹⁵⁴ Commissions are allowed a guardian as com-

¹⁵⁰ *Wilson v. Wilson*, 17 Ohio St. 150.

¹⁵¹ *Drane v. Bayliss*, 1 Humph. (Tenn.) 174; *Adams v. Gleaves*, 10 Lea (Tenn.) 367; *Swope v. Chambers*, 2 Grat. (Va.) 319; *Tittman v. Green*, 108 Mo. 22, 18 S. W. 885.

¹⁵² *May v. May*, 109 Mass. 252; *McElhenny's Appeal*, 46 Pa. St. 347; *In re Roberts*, 3 Johns. Ch. (N. Y.) 43; *State v. Foy*, 65 N. C. 265; *Hughes v. Smith*, 2 Dana (Ky.) 251; *Holcombe v. Holcombe's Ex'rs*, 13 N. J. Eq. 415; *Knowlton v. Bradley*, 17 N. H. 458.

¹⁵³ *May v. May*, 109 Mass. 252; *McElhenny's Appeal*, 46 Pa. St. 347; *Spath's Estates*, 144 Pa. St. 383, 22 Atl. 749; *Emerson, Appellant*, 32 Me. 159; *Evarts v. Nason*, 11 Vt. 122.

¹⁵⁴ *May v. May*, 109 Mass. 252.

pensation for the performance of his duty, and when he has failed in such performance the court will not allow him any compensation at all.¹⁵⁵

SETTLEMENTS OUT OF COURT—GIFTS FROM WARD.

184. The final settlement of a guardian's account, made with the ward out of court, whereby the guardian gains any advantage, will be set aside, unless it appears that the ward has given his deliberate, intelligent, voluntary acquiescence, or is guilty of laches in asserting his rights.
185. Gifts from a ward to his guardian, made during the guardianship, or shortly after its termination, are presumed to have been made under undue influence; and, to uphold them, it must be shown that they were made voluntarily and understandingly.

Any arrangement entered into between a guardian and his ward, whereby the guardian gains an advantage, is looked upon with great suspicion by the court; and, if such an arrangement is to stand, it is incumbent on the guardian to show that he has dealt with his ward exactly as a stranger would have done who was without the knowledge of the ward's affairs possessed by him, and that he has not exercised any influence which he may have acquired over the mind of his ward, to his own advantage, and that he has brought everything to his ward's knowledge which he himself knew.¹⁵⁶ The final settlement of the guardian's account, made out of court, or his purchase of the ward's property shortly after the termination of the guardianship, or the release by the ward of any claims against the guardian, will be scrutinized with the greatest care by the courts. "In a court of law,

¹⁵⁵ *State v. Richardson*, 29 Mo. App. 595; *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87; *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14; *In re Wolfe's Estate* (Surr.) 2 N. Y. Supp. 494; *Pyatt v. Pyatt*, 44 N. J. Eq. 491, 15 Atl. 421; *Appeal of Fish* (Pa. Sup.) 7 Atl. 222; *State v. Gilmore*, 50 Mo. App. 353.

¹⁵⁶ *Hunter v. Atkins*, 3 Mylne & K. 113, 135; *Revett v. Harvey*, 1 Sim. & S. 502; *Hylton v. Hylton*, 2 Ves. Sr. 547; *Allfrey v. Allfrey*, 11 Jur. 981.

the moment of emancipation from legal pupillage is the moment of absolute power and unlimited capacity. This court extends its watchfulness further, and requires that a discharge to the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate, and of its administration. And it requires that a guardian who settles his account in secret shall be prepared to prove that he has fully complied with these requisitions, unless he can shelter himself under a positive ratification,—a deliberate, intelligent, voluntary acquiescence,—or such a flow of time as will induce the court to refuse its interposition.”¹⁵⁷ While every reasonable intendment will be made, in a settlement, in favor of the ward, particularly if he has made allowances in the guardian's favor, yet, if the influence of the guardian has entirely ceased, such settlement and the release of the guardian will be sustained, when made voluntarily on the part of the ward, and without concealment or misrepresentation by the guardian.¹⁵⁸ A settlement of a guardian's final account in a probate court, or other similar

¹⁵⁷ *Fish v. Miller*, 1 Hoff. Ch. (N. Y.) 267. And see *Voltz v. Voltz*, 75 Ala. 566; *Eberts v. Eberts*, 55 Pa. St. 110; *Hall v. Cone*, 5 Day (Conn.) 543; *Stark v. Gamble*, 43 N. H. 465; *Williams v. Powell*, 1 Ired. Eq. (N. C.) 460; *Harris v. Carstarphen*, 69 N. C. 416; *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Powell v. Powell*, 52 Mich. 432, 18 N. W. 203. *Line v. Lawder*, 122 Ind. 548, 23 N. E. 758; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 465. The ward cannot set aside a conveyance made by him after attaining his majority, without restoring the consideration received from his guardian. *Wickiser v. Cook*, 85 Ill. 68. But the tender of the amount received by him is not a condition precedent. *Rist v. Hartner*, 44 La. Ann. 430, 10 South. 759. The ward must act promptly in avoiding a gift or conveyance to his guardian, or he may be barred by his laches. *Felder v. Harbison* (Ky.) 20 S. W. 508; *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685; *In re Alexander's Estate*, 156 Pa. St. 368, 27 Atl. 18; *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924; *Ela v. Ela*, 84 Me. 423, 24 Atl. 893.

¹⁵⁸ *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242; *Hawkins' Appeal*, 32 Pa. St. 263; *Smith v. Davis*, 49 Md. 470; *Davenport v. Olmstead*, 43 Conn. 67; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041; *Condon v. Churchman*, 32 Ill. App. 317; *Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628. But a ward will not be bound by a ratification of his guardian's accounts made in ignorance of material facts. *Long v. Long*, 142 N. Y. 545, 37 N. E. 486.

court of statutory jurisdiction, may likewise be set aside in equity on proof of actual or constructive fraud.¹⁵⁹

Gifts from a ward to his guardian, made during the continuance of the guardianship, are presumed to have been induced by undue influence, and will be set aside unless they are shown to have been entirely voluntary, and to have been clearly understood by the ward.¹⁶⁰ In a leading Vermont case¹⁶¹ it was held that mere lapse of time is not sufficient to prove a ratification of the gift, unless it appears also that the ward knew that the gift was invalid and could be set aside, and, knowing these facts, has consented for an unreasonable time that the gift might stand unquestioned, and that such consent was the result of his free and intelligent choice, and not the result of the pressure and influence arising out of the confidential relations existing between the parties. On the same principle, a gift or conveyance to a guardian made by the ward shortly after the termination of the guardianship is *prima facie* presumed to have been made under undue influence, and will be set aside unless shown to have been entirely voluntary, and made by the ward with a full understanding of his position and rights in regard to his property.¹⁶²

¹⁵⁹ *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529; *Douglass v. Low*, 36 Hun (N. Y.) 497; *Monnin v. Beroujon*, 51 Ala. 196.

¹⁶⁰ *Bisp. Eq.* § 234; *Wood v. Downes*, 18 Ves. 120, 127; *Wade v. Pulsifer*, 54 Vt. 45; *Waller v. Armistead's Adm'rs*, 2 Leigh (Va.) 11; *Farmer's Ex'r v. Farmer*, 39 N. J. Eq. 211.

¹⁶¹ *Wade v. Pulsifer*, 54 Vt. 45.

¹⁶² *Hunter v. Atkins*, 8 Mylne & K. 118; *Berkmeyer v. Kellerman*, 32 Ohio St. 239; *Garvin's Adm'r v. Williams*, 50 Mo. 206; *Ashton v. Thompson*, 82 Minn. 25, 18 N. W. 918; *Tucke v. Buchholz*, 43 Iowa, 415.

CHAPTER XIII.

TERMINATION OF GUARDIANSHIP—ENFORCING GUARDIAN'S LIABILITY.

186. Termination of Guardianship.

187. Enforcement of Guardian's Liability.

188-190. Guardians' Bonds.

TERMINATION OF GUARDIANSHIP.

186. Guardianship is terminated in the following ways :

- (a) By the ward's reaching his majority.
- (b) By the death of the ward.
- (c) By the death of the guardian.
- (d) By the marriage of a female ward.
- (e) Under the statutes of some states, by the marriage of a female guardian.
- (f) By the resignation of the guardian, if he is permitted to resign.
- (g) By removal of the guardian by the court, when he fails to perform his duty, or when he is unfit for the position.

Testamentary guardianship, unless an earlier time is named in the appointment,¹ and chancery² and statute³ guardianship, all terminate at majority. If, however, as has been seen, a guardian continues to manage the ward's estate after his majority, without making a final settlement, this will constitute, in effect, a continuation of the guardianship. It will constitute him a quasi guardian, and he must account for all transactions on the same principles which

¹ Selby v. Selby, 2 Eq. Cas. Abr. 488.

² Eversley, Dom. Rel. 680.

³ Bourne v. Maybin, 3 Wood, 724, Fed. Cas. No. 1,700; Probate Judge v. Stevenson, 55 Mich. 320, 21 N. W. 348; Stroup v. State, 70 Ind. 495; People v. Brooks, 22 Ill. App. 594; Overton v. Beavers, 19 Ark. 623. By express statutory provision in some states, it terminates earlier.

govern his acts during the ward's minority.⁴ On the death of the ward, the guardianship necessarily terminates, and the guardian has no right to act further as guardian, or to administer on the estate, but must adjust his accounts with the ward's legal representatives.⁵ Likewise, on the guardian's death, his executor or administrator has no authority to act as guardian, but must settle the accounts of the guardianship, and pay the balance to the succeeding guardian.⁶ Where there are joint statute⁷ or testamentary⁸ guardians, and one dies, the survivor continues the trust. The reason is that the trust is coupled with an interest. "Letters of guardianship create a trust, coupled with an interest. When two are appointed, and one of them dies, the trust survives. It is so when administration is granted to two. The law is the same as to joint guardians and joint administrators."⁹ The guardianship of a female ward is terminated by her marriage,¹⁰ but the marriage of a male ward does not end the guardianship.¹¹ At common law the marriage of a female guardian

⁴ Ante, p. 301; *Mellish v. Mellish*, 1 Sim. & S. 138; *Stinson v. Leary*, 69 Wis. 269, 34 N. W. 63.

⁵ *Bean v. Bumpus*, 22 Me. 549; *Norton v. Strong*, 1 Conn. 65; *Ordway v. Phelps*, 45 Iowa, 279; *In re Colvin*, 3 Md. Ch. 278; *Barrett v. Provincher*, 39 Neb. 773, 58 N. W. 292.

⁶ *Connelly v. Weatherly*, 33 Ark. 658; *Armstrong's Heirs v. Walkup*, 12 Grat. (Va.) 608; *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205; *Waterman v. Wright*, 36 Vt. 164; *Woodbury v. Hammond*, 54 Me. 332; *Gregg v. Gregg*, 15 N. H. 190.

⁷ *Pepper v. Stone*, 10 Vt. 427. And in this country the same rule applies to chancery guardians. *People v. Byron*, 3 Johns. Cas. (N. Y.) 53. But in England it is otherwise. *Bradshaw v. Bradshaw*, 1 Russ. 528.

⁸ *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103. And, when one declines to act, the other may carry on the trust. *Kevan v. Waller*, 11 Leigh (Va.) 414; *In re Reynolds*, 11 Hun (N. Y.) 41.

⁹ *Pepper v. Stone*, *supra*.

¹⁰ *Bac. Abr.* "Guardian," E; *Mendes v. Mendes*, 1 Ves. Sr. 89; *Bartlett v. Cowles*, 15 Gray (Mass.) 445; *Whitaker's Case*, 4 Johns. Ch. (N. Y.) 378; *Brick's Estate*, 15 Abb. Prac. (N. Y.) 12; *Porch v. Fries*, 18 N. J. Eq. 204; *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Barnet v. Com.*, 4 J. J. Marsh. (Ky.) 389; *Nicholson v. Wilborn*, 13 Ga. 467; *Carpenter v. Soloman* (Tex. App.) 14 S. W. 1074; *Shutt v. Carlross*, 1 Ired. Eq. (N. C.) 232; *Armstrong's Heirs v. Walkup*, 12 Grat. (Va.) 608.

¹¹ 2 Kent, Comm. 226; *Mendes v. Mendes*, 1 Ves. Sr. 89; *Brick's Estate*, 15 Abb. Prac. (N. Y.) 12.

in socage had the effect of terminating her guardianship, and transferring it to her husband;¹² but the marriage of a female testamentary guardian did not have this effect.¹³ It has been held that the marriage of a female statute guardian does not terminate the guardianship,¹⁴ but, by statute in some states, it is otherwise.¹⁵ In some jurisdictions her husband becomes a joint guardian with her.¹⁶

One appointed a socage guardian could not refuse the office,¹⁷ nor resign.¹⁸ And it has been held that a testamentary guardian has no right to resign.¹⁹ When he refuses to act, however, the court may appoint a successor.²⁰ Guardians appointed by the court of chancery cannot resign without valid grounds, and must obtain the sanction of the court.²¹ Statute guardians are, by express provision, often allowed to resign their office; and, when there is no express enactment to that effect, their tender of resignation is sufficient ground for their removal, where the court has the power of removal for cause.²²

Removal of Guardians.

As incident to its general jurisdiction in guardianship, the court of chancery, in England, has the power to remove guardians whom it has appointed;²³ and, while testamentary guardians cannot be re-

¹² Bac. Abr. "Guardian and Ward," E.

¹³ Com. Dig. "Guardian," 384; *Dillon v. Lady Mount Cashell*, 4 Brown, Parl. Cas. 306; ante, p. 298.

¹⁴ *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Cotton's Guardian v. Wolf*, 14 Bush (Ky.) 238; *Guardianship of Mary Elgin*, 1 Tuck. (N. Y.) 97. But see *Swartwout v. Swartwout*, 2 Redf. Sur. (N. Y.) 52.

¹⁵ *Carr v. Spannagel*, 4 Mo. App. 285; *Field v. Torrey*, 7 Vt. 372; *Swartwout v. Swartwout*, supra.

¹⁶ *Wood v. Stafford*, 50 Miss. 370; *Martin v. Foster's Ex'rs*, 38 Ala. 688.

¹⁷ *Eversley*, Dom. Rel. 683; *Bedell v. Constable*, Vaughan, 177.

¹⁸ *St. Marlbridge*, 52 Hen. III. c. 17.

¹⁹ *Spencer v. Earl of Chesterfield*, 1 Amb. 146; *Young v. Lorain*, 11 Ill. 625.

²⁰ *Spencer v. Earl of Chesterfield*, supra; *O'Keefe v. Casey*, 1 Schoales & L. 106; *McAlister v. Olmstead*, 1 Humph. (Tenn.) 210; *Ex parte Crumb*, 2 Johns. Ch. (N. Y.) 439.

²¹ *Eversley*, Dom. Rel. 684.

²² *Young v. Lorain*, 11 Ill. 624; *Brown v. Huntsman*, 32 Minn. 466, 21 N. W. 555. The court may appoint a successor. *Simpson v. Gonzalez*, 15 Fla. 9; *Lefever v. Lefever*, 6 Md. 472.

²³ *Eversley*, Dom. Rel. 684.

moved, they may be superseded and restrained from interfering with the infant's person or estate.²⁴ Courts of chancery in the United States, possessing a general jurisdiction in equity, have sometimes exercised such jurisdiction in matters pertaining to guardianship. It has been held that such courts may remove, not only guardians appointed by themselves, but also statutory and testamentary guardians.²⁵ Probate, surrogates', and similar courts, invested by statute with jurisdiction in matters pertaining to guardianships, generally have the power to remove testamentary guardians²⁶ and guardians of their own appointing.²⁷

A breach of official duty by a guardian, such as the use of the ward's property for his own advantage,²⁸ the failure to apply the income of the ward's property to his support,²⁹ the waste of the estate,³⁰ or failure to file an inventory when ordered,³¹ has been held sufficient ground for removal. Removal will also be made in case the guardian is unfit for the position,—as when his interests are hostile to the ward's;³² when his influence, on account of confirmed habits of intoxication³³ or immoral life,³⁴ is bad; where, through ignorance, he is incompetent to manage the estate,³⁵ or has been convicted of a crime.³⁶ Insolvency will not necessarily disqualify,³⁷

²⁴ *Foster v. Denny*, 2 Ch. Cas. 237; *Ingham v. Bickerdike*, 6 Madd. 275.

²⁵ *Cowls v. Cowls*, 3 Gilm. (Ill.) 435; *Ex parte Crumb*, 2 Johns. Ch. (N. Y.) 439; *Disbrow v. Henshaw*, 8 Cow. (N. Y.) 349; 2 Kent, Comm. 227.

²⁶ *McPhillips v. McPhillips*, 9 R. I. 536; *Damarell v. Walker*, 2 Redf. Sur. (N. Y.) 198; *Copp v. Copp*, 20 N. H. 284.

²⁷ *Simpson v. Gonzalez*, 15 Fla. 9; *In re Clement's Appeal*, 25 N. J. Eq. 508; *Skidmore v. Davies*, 10 Paige (N. Y.) 316.

²⁸ *Snavely v. Harkrader*, 29 Grat. (Va.) 112; *O'Neil's Case*, 1 Tuck. (N. Y.) 84; *Wood v. Black*, 84 Ind. 279; *Cooper's Case*, 2 Paige (N. Y.) 34. But see *Sweet v. Sweet*, *Speer*, Eq. (S. C.) 309.

²⁹ *In re Swift*, 47 Cal. 629; *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395.

³⁰ *Dickerson v. Dickerson*, 31 N. J. Eq. 652.

³¹ *Windsor v. McAtee*, 2 Mete. (Ky.) 430; *ante*, p. 341.

³² Conduct tending to alienate the child's affections from its mother has been held sufficient ground for removal. *Perkins v. Finnegan*, 105 Mass. 501.

³³ *Kettletas v. Gardner*, 1 Paige (N. Y.) 488.

³⁴ *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395.

³⁵ *Nicholson's Appeal*, 20 Pa. St. 50; *Wood v. Black*, 84 Ind. 279.

³⁶ *Estate of Soley*, 13 Phila. (Pa.) 402.

³⁷ *Chew's Estate*, 4 Md. Ch. 60.

though it has been held sufficient ground for removal.³⁸ Removal from the state has been held a ground for revoking the appointment,³⁹ and is sometimes expressly made so by statute.⁴⁰ When a guardian has obtained his appointment through false representations, he may be removed.⁴¹ A guardian cannot be removed by the court without due notice to him;⁴² and the appointment of a new guardian will not have that effect, the guardianship continuing until a judicial decree of removal is made.⁴³

ENFORCEMENT OF GUARDIAN'S LIABILITY.

187. A suit does not lie by the ward against the guardian during the guardianship, but courts of chancery have a general jurisdiction to control guardians of their own appointment in the management of the estate. The liability of statute guardians is usually enforced by means of their bonds.

Where a guardian misappropriates his ward's funds, an action at law will not lie at the suit of the ward, in *indebitatus assumpsit*.⁴⁴ Nor can a bill in equity be brought, although a guardian has assets of the ward in his hands, to charge him for nonpayment of the ward's debts, since there is an adequate remedy at law on the guardian's bond.⁴⁵ The relation being that of trustee and *cestui que trust*, and

³⁸ *In re Cooper*, 2 Paige (N. Y.) 34. And see *Baldrige v. State*, 69 Ind. 166.

³⁹ *Cooke v. Beale*, 11 Ired. (N. C.) 36. See *Succession of Cass*, 42 La. Ann. 381, 7 South. 617.

⁴⁰ *State v. Engelke*, 6 Mo. App. 356; *Speight v. Knight*, 11 Ala. 461.

⁴¹ *In re Clement's Appeal*, 25 N. J. Eq. 508; *Pease v. Roberts*, 16 Ill. App. 634.

⁴² *Gwin v. Vanzant*, 7 Yerg. (Tenn.) 143; *Copp v. Copp*, 20 N. H. 284; *Montgomery v. Smith*, 3 Dana (Ky.) 599; *Speight v. Knight*, 11 Ala. 461; *State v. Engelke*, 6 Mo. App. 356; *Hart v. Gray*, 3 Sumn. 339, Fed. Cas. No. 6,152. Contra, where he leaves the state. *Cooke v. Beale*, 11 Ired. (N. C.) 36.

⁴³ *Fay v. Hurd*, 8 Pick. (Mass.) 528; *Copp v. Copp*, 20 N. H. 284; *Bledsoe v. Britt*, 6 Yerg. (Tenn.) 458, 463; *Robinson v. Zollinger*, 9 Watts (Pa.) 169; *Thomas v. Burrus*, 23 Miss. 550.

⁴⁴ *Brooks v. Brooks*, 11 Cush. (Mass.) 18; *Thorndike v. Hinckley*, 155 Mass. 263, 29 N. E. 579; *Linton v. Walker*, 8 Fla. 144.

⁴⁵ *Conant v. Kendall*, 21 Pick. (Mass.) 36.

not that of debtor and creditor, the guardian is subject to all the liabilities, and entitled to all the benefits, incidental to his position, one of which is the right to an opportunity to render his account, and to have the same adjusted by the court.⁴⁶ It has also been held that a ward cannot recover damages during the guardianship, in a suit against his guardian for an assault and battery, though it might be ground for his removal or for redress in the criminal courts.⁴⁷

A court of chancery, as it has a general jurisdiction over guardians appointed by it, can make such orders during the continuance of the guardianship as are necessary to protect the ward's estate, and, by a bill in equity brought by the ward through his next friend, the guardian may be compelled to account.⁴⁸ In matters of accounting, courts of probate and other similar courts are often held to possess powers which are co-extensive with those of a court of chancery, and they adopt the same forms and mode of procedure.⁴⁹ Courts having a general jurisdiction over the estates of wards have also been held to have the power to order the payment of claims.⁵⁰ When a guardian retains his ward's property after the termination of the guardianship, the action of account will lie at law, at the suit of the ward.⁵¹ Statute guardians are generally held to accountability by enforcing their liability under their bonds, as explained in the following section.

⁴⁶ *Brooks v. Brooks*, 11 Cush. (Mass.) 18; *Bonner v. Evans*, 89 Ga. 656, 15 S. E. 906; *Minter v. Clark*, 92 Tenn. 459, 22 S. W. 73.

⁴⁷ *Mason v. Mason*, 19 Pick. (Mass.) 506. But see *Brattain v. Cannady*, 96 Ind. 266.

⁴⁸ *Blake v. Blake*, 2 Schoales & L. 26; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; *Swan v. Dent*, 2 Md. Ch. 111; *Linton v. Walker*, 8 Fla. 144; *Lemon v. Hansbarger*, 6 Grat. (Va.) 301; *Manning v. Manning*, 61 Ga. 137; *Peck v. Braman*, 2 Blackf. (Ind.) 141.

⁴⁹ *In re Steele*, 65 Ill. 322; *Cheney v. Roodhouse*, 135 Ill. 257, 25 N. E. 1019; *Tudhope v. Potts*, 91 Mich. 490, 51 N. W. 1110; *Seaman v. Duryea*, 11 N. Y. 324.

⁵⁰ *Yeakle v. Winters*, 60 Ind. 554; *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104.

⁵¹ *Field v. Torrey*, 7 Vt. 372; *Harris v. Harris*, 44 Vt. 320; *Green v. Johnson*, 3 Gill & J. (Md.) 389.

GUARDIANS' BONDS.

188. All guardians, with the exception of testamentary guardians in some jurisdictions, must give bonds before entering on their duties; and they and their sureties are liable thereunder for all losses occurring through the guardians' delinquencies.
189. The liability under a guardian's bond continues until barred by the statute of limitations. By the weight of authority, it cannot be enforced until determined by the settlement of the final account.
190. The sureties on the special-sale bond, and not those on the general bond, are, by the weight of authority, liable for the proceeds of a sale of real estate under order of the court.

Guardians of the person and estate appointed by the court of chancery in England,⁵² and statute guardians in this country,⁵³ are required to give bonds, with sureties satisfactory to the court, for the faithful discharge of their duties, and to duly account. They have no authority to act before the giving of the bond.⁵⁴ The guardian and his sureties are responsible for all property, of every nature and description, which comes, or which, if the guardian performs his duty, should come, into his hands as guardian,⁵⁵ as well as for losses occurring through his failure to perform his duty.⁵⁶ For property of

⁵² Eversley, Dom. Rel. 657.

⁵³ By statute, testamentary guardians are often required to give bond, and render account. *Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310.

⁵⁴ *Wuesthoff v. Insurance Co.*, 107 N. Y. 580, 14 N. E. 811; *Poe v. Schley*, 16 Ga. 364; *Westbrook v. Comstock*, Walk. (Mich.) 314; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458.

⁵⁵ *Mattoon v. Cowing*, 13 Gray (Mass.) 387; *Brooks v. Tobin*, 135 Mass. 69; *Pierce v. Prescott*, 128 Mass. 140; *Bond v. Lockwood*, 33 Ill. 212; *McClendon v. Harlan*, 2 Heisk. (Tenn.) 337; *Hunt v. State*, 53 Ind. 321; *Neill v. Neill*, 31 Miss. 36; *State v. Brown*, 73 N. C. 81; *Butler v. Legro*, 62 N. H. 350; *Culp v. Stanford*, 112 N. C. 664, 16 S. E. 761.

⁵⁶ *Richardson v. Boynton*, 12 Allen (Mass.) 138; *Taylor v. Hemingray*, 81

his ward which may come into his hands otherwise than in his capacity as guardian, his sureties are not responsible.⁶⁷ Nor are they liable for property received, or for acts performed, after his final discharge.⁶⁸ But the termination of the guardianship does not relieve the sureties from liability for property received and acts performed during its continuation,⁶⁹ and their liability continues, unless limited by special statute, until the statute of limitations has run.⁶⁰ On the death of the surety, his estate is liable.⁶¹ Even the discharge of a surety will relieve him only from the acts of the guardian occurring subsequent to the giving of a new bond.⁶² For previous acts the sureties on the old and new bonds are in some jurisdictions jointly liable,⁶³ but in others the second bond has been held not to be retrospective.⁶⁴ By the weight of authority, an action on a guardian's bond will not lie until the guardian's liability is determined by the settlement of his final account.⁶⁵

Ky. 158; *Jennings v. Copeland*, 90 N. C. 572; *Eichelberger v. Gross*, 42 Ohio St. 549; *Yost v. State*, 80 Ind. 350.

⁶⁷ *Livermore v. Bemis*, 2 Allen (Mass.) 394; *Hinckley v. Probate Judge*, 45 Mich. 343, 7 N. W. 907; *Allen v. Crosland*, 2 Rich. Eq. (S. C.) 68; *Hindman v. State*, 61 Md. 471.

⁶⁸ *Merrells v. Phelps*, 34 Conn. 109.

⁶⁹ *Nangle v. State*, 101 Ind. 284; *In re Walling*, 35 N. J. Eq. 105; *Jennings v. Copeland*, 90 N. C. 572.

⁶⁰ *Bonham v. People*, 102 Ill. 434; *Ragland v. Justices*, 10 Ga. 65. The statute runs from the time the guardian accounts, *Bell v. Rudolph*, 70 Miss. 231, 12 South. 153; or from the time when he denies or repudiates the trust, *Reuter v. Lawe*, 86 Wis. 106, 56 N. W. 472. In the case of fraud, the statute runs from the date of its discovery, *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924; but not before the ward's majority, *Minter v. Clark*, 92 Tenn. 459, 22 S. W. 73.

⁶¹ *Anderson v. Thomas*, 54 Ala. 104; *Hutchcraft v. Shrout's Heirs*, 1 T. B. Mon. (Ky.) 208; *Brooks v. Rayner*, 127 Mass. 268; *Cotton v. State*, 64 Ind. 573.

⁶² *Eichelberger v. Gross*, 42 Ohio St. 549; *In re Conover*, 35 N. J. Eq. 108; *Bellune v. Wallace*, 2 Rich. Law (S. C.) 80; *Yost v. State*, 80 Ind. 350.

⁶³ *Loring v. Bacon*, 3 Cush. (Mass.) 465; *Hutchcraft v. Shrout's Heirs*, 1 T. B. Mon. (Ky.) 208; *Bell's Adm'r v. Jasper*, 2 Ired. Eq. (N. C.) 597; *Ammons v. People*, 11 Ill. 6; *Steele v. Reese*, 6 Yerg. (Tenn.) 263.

⁶⁴ *Lowry v. State*, 64 Ind. 421; *State v. Jones*, 89 Mo. 470, 1 S. W. 355; *State v. Shackelford*, 56 Miss. 648; *Sebastian v. Bryan*, 21 Ark. 447.

⁶⁵ *Murray v. Wood*, 144 Mass. 195, 10 N. E. 822; *Bailey v. Rogers*, 1 Me. 186;

When a special bond is required, as on the sale of real estate by a guardian under a license by the court, the conduct of such sale, and the application of the proceeds thereof in accordance with the license, are generally held a separate trust, and not one of the general duties of the guardianship; and therefore, in case of a breach, the sureties on the special bond are liable, and not those on the general bond.⁶⁶

Stilwell v. Mills, 19 Johns. (N. Y.) 304; *Bisbee v. Gleason*, 21 Neb. 534, 32 N. W. 578; *Allen v. Tiffany*, 53 Cal. 16; *Vermilya v. Bunce*, 61 Iowa, 605, 16 N. W. 735; *Ordinary v. Heishon*, 42 N. J. Law, 15. Contra, *State v. Slevin*, 93 Mo. 253, 6 S. W. 68; *Wolfe v. State*, 59 Miss. 338; *Call v. Ruffin*, 1 Call (Va.) 333; *Bonham v. People*, 102 Ill. 434; *Farrington v. Secor* (Iowa) 60 N. W. 193. There need be no accounting when the liability is otherwise definitely determined. *Long v. Long*, 142 N. Y. 545, 37 N. E. 486.

⁶⁶ *Lyman v. Conkey*, 1 Metc. (Mass.) 317; *Swartwout v. Oaks*, 52 Barb. (N. Y.) 622; *Yost v. State*, 80 Ind. 350; *Williams v. Morton*, 38 Me. 47; *Judge of Probate v. Toothaker*, 83 Me. 195, 22 Atl. 119; *Blauser v. Diehl*, 90 Pa. St. 350; *Smith v. Gummere*, 39 N. J. Eq. 27; *Madison Co. v. Johnston*, 51 Iowa, 152, 50 N. W. 492. Contra, *Hart v. Stribling*, 21 Fla. 136; *State v. Cox*, 62 Miss. 786. Where a guardian sold for reinvestment, and neglected to reinvest, he was held liable, under his special-sale bond, for the principal, and, on his general bond, for interest thereon. *Mattoon v. Cowing*, 13 Gray (Mass.) 387. But see *Smith v. Gummere*, supra. The liability under a special-sale bond has been held limited to a proper compliance with the perquisites to the sale, a faithful discharge of the duties in conducting it, and to investing the proceeds as directed by the order, and as not extending to the subsequent management of such proceeds, or their final payment at the expiration of the guardianship. *Fay v. Taylor*, 11 Metc. (Mass.) 529.

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PART IV.

INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

CHAPTER XIV.

INFANTS.

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- 216-217. Actions in Tort by Infant.
- 218-219. Liability for Torts.
- 220-221. Infants as Parties to Actions.

INFANCY DEFINED.

191. At common law all persons under 21 years of age are infants. But, by statute, in some states females attain their majority at 18, and in some states, by statute, all minors attain their majority on marriage.

The term "infancy" is used in law to designate the status of persons under the age of majority, which is fixed at common law at 21 for both sexes. Since the law disregards fractions of a day in computing time, an infant becomes of age at the first moment of the day preceding the twenty-first anniversary of his birth.¹ By

¹ 1 Bl. Comm. 463; 2 Kent, Comm. 233; Anon., 1 Ld. Raym. 480; Fitz-Hugh v. Dennington, 6 Mod. 259; Hamlin v. Stevenson, 4 Dana (Ky.) 597; State v. Clarke, 3 Har. (Del.) 557; Wells v. Wells, 6 Ind. 447; Bardwell v. Purington, 107 Mass. 419.

statute, in some states females become of age at 18; in others, on marriage; and in a few states both sexes attain their majority on marriage.²

CONTRACTS OF INFANTS.

192. The contracts of an infant are either void, voidable, or valid. Thus—

- (a) It was formerly held that all contracts of an infant which are manifestly to his prejudice are absolutely void; and in some states, still, powers of attorney, appointments of an agent, contracts of suretyship, and bonds with a penalty are held void. The tendency now is to hold no contract void.
- (b) Where a contract is not void, nor valid, as hereafter explained, it is simply voidable at the infant's option. Most contracts are within this class.
- (c) The following contracts are valid, and bind the infant as well as the adult:
 - (1) Contracts created by law or quasi contracts.
 - (2) Contracts for necessities. By the better opinion, these are contracts created by law.
 - (3) Contracts entered into under direction or authority of a statute.
 - (4) Contracts made in order to do what he was legally bound to do, and could have been compelled to do.
 - (5) Contracts entered into by him in a representative capacity.
 - (6) In some jurisdictions an executed contract is binding upon an infant where he has received a substantial benefit under it, and cannot place the other party in statu quo. As to this, however, there is much doubt, and the weight of authority is the other way.

² Stim. Am. St. Law, § 660L.

To protect infants from the injuries which might arise from their own acts or the acts of designing adults through their inexperience and immature mental capacity, the law has thrown its protection around them, in the form of various privileges and disabilities. The principal of these is the privilege of avoiding their contracts, and the disability to bind themselves by their contracts, under certain circumstances. Contracts of infants are either void, voidable, or valid; "void" being used in the sense of void for all purposes, and incapable of ratification; "voidable," in the sense of voidable at the option of the infant; and "valid," in the sense of binding on the infant. Emancipation of an infant by his parent relieves him, as has been seen, from the duties arising from the relation of parent and child.³ But this does not remove the disabilities arising from his infancy. It does not clothe him with capacity to contract.⁴

Void and Voidable Contracts.

There is much confusion among the decisions in regard to infants' contracts, arising from the failure to use the words "void" and "voidable" in a uniform sense; "void" being used in many cases to mean simply not enforceable, and in others to mean not capable of ratification. But, aside from this, there is great inconsistency among the cases as to what contracts are void, and what are voidable; a gradual change having taken place in most jurisdictions in favor of holding infants' contracts voidable rather than void. Many contracts which would merely have been held void are now held merely voidable. The object of the law being to protect the infant from dangers peculiar to infancy, it is considered that this object is fully attained by leaving it for him to decide whether or not he will be bound on reaching his majority.

Keane v. Boycott⁵ is a leading case representing the old rule. In that case the doctrine was stated to be (1) that where the court could pronounce the contract for the benefit of the infant, as for necessities, it was good; (2) that, where the court could pronounce it to his prejudice, it was void; (3) that, in those cases where the

³ Ante, p. 258.

⁴ Mason v. Wright, 13 Metc. (Mass.) 306; Tyler v. Gallop's Estate, 68 Mich. 185, 35 N. W. 902; Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345; Person v Chase, 37 Vt. 647. See Clark, Cont. 222.

⁵ 2 H. Bl. 511.

benefit or prejudice was uncertain, the contract was voidable only. And the same doctrine has been laid down in this country.⁶ According to this classification, and on the theory of manifest prejudice to the infant, some courts hold that a power or appointment of attorney by an infant is absolutely void, and a nullity.⁷ Some courts extend the rule to all appointments of agents.⁸ And the same has been held as to contracts of suretyship and obligations with a penalty by infants.⁹

In many cases, on the other hand, the courts have rejected this doctrine, and the tendency to-day is to leave it for the infant to pass on the question of benefit or prejudice on reaching his majority. Under these decisions, all, or nearly all, contracts of infants, are merely voidable, without regard to their appearing to be prejudicial to the infant or otherwise, excepting certain contracts which are binding on him.¹⁰ Thus, in *Williams v. Moor*,¹¹ Baron Parke said: "The promise is not void in any case unless the infant chooses to plead his infancy." And in a recent case¹² it was

⁶ 2 Kent, Comm. 234; *Tucker's Lessee v. Moreland*, 10 Pet. 65; *Robinson v. Weeks*, 56 Me. 102; *Dunton v. Brown*, 31 Mich. 182; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. 761. In *Vent v. Osgood*, 19 Pick. (Mass.) 572, it was said: "Whether a contract by an infant be void or voidable or binding is frequently a question of very difficult solution. If it be clearly prejudicial to him, it is void. If it may be for his benefit, or to his damage, it is voidable at his election, and he may avoid it during his minority, or when he becomes of full age. If the contract be clearly beneficial to him, he is bound."

⁷ *Saunderson v. Marr*, 1 H. Bl. 75; *Lessee of Lawrence v. McArter*, 10 Ohio, 37; *Wainwright v. Wilkinson*, 62 Md. 146; *Knox v. Flack*, 22 Pa. St. 337; *Waples v. Hastings*, 3 Har. (Del.) 403; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Bennett v. Davis*, 6 Cow. 393. The same court refused to follow the rule in the case of a power coupled with an interest. *Duvall v. Graves*, 7 Bush (Ky.) 461.

⁸ *Trueblood v. Trueblood*, 8 Ind. 195; *Armitage v. Widoe*, 36 Mich. 124; *Flexner v. Dickerson*, 72 Ala. 318.

⁹ Suretyship, *Maples v. Wightman*, 4 Conn. 376. Obligations with a penalty, *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dineley*, 3 Maule & S. 477.

¹⁰ Post, p. 364.

¹¹ 11 Mees. & W. 256.

¹² *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476. And see *Harner v. Dipple*, 31 Ohio St. 72; *Fetrow v. Wiseman*, 40 Ind. 148; *Henry v. Root*, 33 N. Y. 526; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Mustard v. Wohl-*

said: "The true doctrine now seems to be that the contract of an infant is in no case absolutely void. An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age. In other words, infancy confers a privilege, rather than imposes a disability." According to this doctrine, some of the courts, contrary to the cases heretofore referred to, regard powers or appointments of attorneys, and all appointments of agents, merely voidable by the infant at his option.¹³ And the same is true of contracts of suretyship and obligations with a penalty.¹⁴ The cases are uniform in holding an infant's conveyances or mortgages of real estate, his purchases of real estate, and his sales, mortgages, and purchases of personal property, merely voidable.¹⁵ The same may be said of most other contracts,—partnership agreements,¹⁶ agreements to render services,¹⁷ promissory

ford's Heirs, 15 Grat. (Va.) 329; *Cole v. Pennoyer*, 14 Ill. 158; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Bozeman v. Browning*, 31 Ark. 364; *Weaver v. Jones*, 24 Ala. 420; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Pars. Cont.* 295; *Pollock, Cont.* 52. The modern rule has been followed in regard to all classes of contracts. For collection of authorities in regard to infants' bills and notes, bonds, mortgages, conveyances, leases, etc., see *Am. & Eng. Enc. Law*, note 1, p. 630 et seq.

¹³ *Whitney v. Dutch*, 14 Mass. 457; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Alsworth v. Cordtz*, 31 Miss. 32. See, also, *Ferguson v. Railway Co.*, 73 Tex. 344, 11 S. W. 347.

¹⁴ *Suretyship*, *Owen v. Long*, 112 Mass. 403; *Reed v. Lane*, 61 Vt. 481; *Fetrow v. Wiseman*, 40 Ind. 148; *Williams v. Harrison*, 11 S. C. 412; *Harner v. Dipple*, 31 Ohio St. 72. Bonds with a penalty, *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329; *Weaver v. Jones*, 24 Ala. 420.

¹⁵ *Cole v. Pennoyer*, 14 Ill. 158; *Irvine v. Irvine*, 9 Wall. 617; *Zouch v. Parsons*, 3 Burrows, 1794; *Bigelow v. Kinney*, 3 Vt. 353; *Logan v. Gardner*, 136 Pa. St. 588, 20 Atl. 625; *Henry v. Root*, 33 N. Y. 526; *Callis v. Day*, 38 Wis. 643; *Manning v. Johnson*, 26 Ala. 446; *French v. McAndrew*, 61 Miss. 187.

¹⁶ *Dunton v. Brown*, 31 Mich. 182. A minor who has entered into a partnership may disaffirm the partnership agreement, and withdraw, and he may plead his infancy as a defense against personal liability for the firm

¹⁷ *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Clark v. Goddard*, 39 Ala. 161; *Harney v. Owen*, 4 Blackf. (Ind.) 337.

notes,¹⁸ indorsements of a bill or note,¹⁹ lease by or to infant,²⁰ submission to arbitration,²¹ settlement of disputed boundary,²² compromise of action or claim,²³ promise to marry.²⁴

Valid Contracts.

Voidable contracts are in one sense valid,—that is, they are valid until avoided; but the term “valid,” as used in reference to infants’ contracts, means such contracts as are binding on the infant as well as on the contracting party. This is the sense in which the term is used here. While most contracts made by an infant are voidable by him, there are certain contracts which bind.

Quasi contracts or contracts created by law, because of a legal duty on the part of the party bound, are as binding on an infant as on an adult. The liability of a husband to pay for necessities

debts. *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Dunton v. Brown*, 31 Mich. 182; *Bush v. Linthicum*, 59 Md. 344; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664; *Yates v. Lyon*, 61 N. Y. 344; *Whittemore v. Elliott*, 7 Hun (N. Y.) 518. But he cannot withdraw what he has invested in the business from the claims of firm creditors. *Shirk v. Shultz*, *supra*; *Adams v. Beall*, *supra*; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Page v. Morse*, 128 Mass. 99; *Skinner v. Maxwell*, 66 N. C. 45; *Furlong v. Bartlett*, 21 Pick. (Mass.) 401. In *Moley v. Brine*, 120 Mass. 324, it was held that, when the assets of the firm are not sufficient to pay the partners the amount invested by each in full, the infant partner cannot insist on payment in full, but is only entitled to share in the assets in proportion to the amount which he invested.

¹⁸ *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Petrow v. Wiseman*, 40 Ind. 148; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478; *Earle v. Reed*, 10 Metc. (Mass.) 389; *Minock v. Shortridge*, 21 Mich. 314.

¹⁹ *Nightingale v. Withington*, 15 Mass. 272; *Willis v. Twambly*, 13 Mass. 204; *Frazier v. Massey*, 14 Ind. 382; *Briggs v. McCabe*, 27 Ind. 327.

²⁰ *Zouch v. Parsons*, 3 Burrows, 1794; *Griffith v. Schwenderman*, 27 Mo. 412.

²¹ *Jones v. Bank*, 8 N. Y. 228; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221.

²² *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114.

²³ *Ware v. Cartledge*, 24 Ala. 622; *Baker v. Lovett*, 6 Mass. 78.

²⁴ *Holt v. Ward Clarendieux*, 2 Strange, 937; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; *Rush v. Wick*, 31 Ohio St. 521; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659. In *McConkey v. Barnes*, 42 Ill. App. 511, it was held that a statute providing that persons under the age of 21 years “may contract and be joined in marriage” does not remove an infant’s disability, so as to render him liable for breach of his promise to marry, but merely means that an actual marriage by an infant shall be valid.

furnished to his wife or children, and the liability of a husband to pay his wife's antenuptial debts, are imposed on infant as well as adult husbands.²⁵ And so it is as to any other quasi contractual liability.* These kinds of obligation do not depend upon the consent of the person bound, but are imposed by law, and therefore the reasons for which an infant is allowed to avoid his contracts do not apply. As will be seen, the liability of an infant for necessities furnished him is really a quasi contractual liability, and might properly be treated under this head. The importance of the subject, however, makes a separate treatment advisable.

Contracts made by an infant under authority or direction of a statute—as when he executes a bond for the support of a bastard child,²⁶ gives a recognizance for appearance in court,²⁷ enters into a contract of enlistment in the army,²⁸ or makes an assignment under a statute allowing “every person” to assign²⁹—cannot be avoided by him.

A contract executed by an infant which the law could have compelled him to execute is binding, and cannot be avoided by him, though actually executed without the intervention of the law. It was accordingly held in the leading case of *Zouch v. Parsons*,³⁰ where lands had been conveyed to an infant as security, and a reconveyance made by the infant on payment of the debt, that the reconveyance could not subsequently be avoided. So, where a father caused lands to be placed in his minor son's name to defraud his creditors, and thereafter sold the lands to a purchaser for a

²⁵ *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Cole v. Seeley*, 25 Vt. 220; *Butler v. Breck*, 7 Metc. (Mass.) 164; *Nicholson v. Wilborn*, 13 Ga. 467; *Cantine v. Phillips' Adm'r*, 5 Har. (Del.) 428.

* Pctt, p. 411, note 243.

²⁶ *People v. Moores*, 4 Denio (N. Y.) 518.

²⁷ *Tyler, Inf.* § 122; *State v. Weatherwax*, 12 Kan. 463; *Dial v. Wood*, 9 Baxt. (Tenn.) 296.

²⁸ *Rex v. Inhabitants of Rotherfield Greys*, 1 Barn. & C. 345; *U. S. v. Bainbridge*, 1 Mason, 71, 83, Fed. Cas. No. 14,497; *In re Hearn*, 32 Fed. 141; *Com. v. Murray*, 4 Bin. (Pa.) 487; *U. S. v. Blakeney*, 3 Grat. (Va.) 405; *Com. v. Gamble*, 11 Serg. & R. (Pa.) 93; *In re Higgins*, 16 Wis. 351.

²⁹ *People v. Mullin*, 25 Wend. (N. Y.) 698.

³⁰ 3 Burrows, 1801.

valuable consideration, and the infant executed a deed to such purchaser, it was held that the infant could not avoid the conveyance on coming of age.³¹ So, where an infant fraudulently obtained the legal title to real estate under such circumstances as to create a constructive trust in favor of another, and thereafter deeded the property to the beneficiary, it was held that he could not disaffirm his deed in execution of the trust, since it was a duty which a court of equity would have compelled him to perform.³² So, generally, an infant cannot, on his majority, avoid an act which he could have been compelled to perform.³³

When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation, as under a contract for necessities furnished his wife and children, where the parent is held liable for his child's support,³⁴ or on a promissory note given for such necessities.³⁵ Money advanced at the request of an infant to procure his release from arrest for a debt incurred for necessities,³⁶ or to pay a debt for necessities,³⁷ can be recovered from him. An agreement by an infant with the mother of his illegitimate child, to support it, was held a valid claim against the minor's estate, on his decease, as being an agreement to perform an obligation which he was legally bound to perform.³⁸ A note given by an infant in settlement of his liability for a tort has, on the same principle, been held enforceable against him.³⁹

Acts performed by an infant as executor, agent, officer of a corporation, or in any other representative capacity, which do not touch his own interest, but which are in the exercise of authority

³¹ *Elliott v. Horn*, 10 Ala. 348; *Prouty v. Edgar*, 6 Iowa, 353; *Starr v. Wright*, 20 Ohio St. 97.

³² *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599.

³³ 2 Kent, Comm. 242; *Tucker's Lessee v. Moreland*, 10 Pet. 58; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Trader v. Jarvis*, 23 W. Va. 100.

³⁴ *People v. Moores*, 4 Denio (N. Y.) 518.

³⁵ *Sawyer v. Cutting*, 23 Vt. 486.

³⁶ *Clarke v. Leslie*, 5 Esp. 28.

³⁷ *Randall v. Sweet*, 1 Denio (N. Y.) 460.

³⁸ *Stowers v. Hollis*, 83 Ky. 544; *Gavin v. Burton*, 8 Ind. 69.

³⁹ *Ray v. Tubbs*, 50 Vt. 688.

intrusted to him, are binding.⁴⁰ Such a contract is not a contract of the infant. He does not attempt to bind himself. There is no reason why he should not act as agent so as to bind another who has duly authorized him.

In some jurisdictions it is held that, if the contract is so far executed that the infant has received the consideration, he cannot repudiate the contract, and recover what he has paid, unless he can and does place the other party in statu quo.⁴¹ This doctrine is not generally accepted, as we shall presently see, in cases where the consideration cannot be returned.⁴²

LIABILITY FOR NECESSARIES.

193. An infant is liable for the reasonable value of necessities furnished to him, or to his wife, or, in some, but not all, jurisdictions, to his children, where he refuses or neglects to provide for them. What are "necessaries" will depend upon the circumstances of the particular case. The term includes whatever is reasonably needed for subsistence, health, comfort, or education, taking into consideration his state, station, and degree in life. The term does not include

- (a) What is purely ornamental.
- (b) What contributes solely to pleasure.
- (c) What he is already fully supplied with.
- (d) Articles which might otherwise be necessities, when he is living under the care of his parent or guardian, and is supplied by him with such things as he considers necessary.
- (e) What concerns his estate or business, and not his person.

⁴⁰ Metc. Cont. 66; Schouler, Dom. Rel. 416; Zouch v. Parsons, 3 Burrows, 1794, 1802.

⁴¹ 2 Kent, Comm. 240; Adams v. Beall, 67 Md. 53, 8 Atl. 664.

⁴² Post. p. 391.

(f) He is not liable at law, though it is otherwise in equity, for money borrowed by him, though expended for necessities, but he is liable even at law where the lender applies the money himself, or sees it applied, in payment for necessities, or pays it for necessities already furnished.

194. Persons supplying an infant act at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessities.

195. It is the province of the court to determine whether the particular article furnished falls within the definition of "necessaries," and of the jury to say whether they are necessities under the circumstances of the particular case.

196. As an infant is liable only for the reasonable value of the necessities furnished him, he cannot bind himself by an express contract of such a nature that the consideration cannot be inquired into; but, if the consideration can be inquired into, an express contract is binding to the extent of the value of the necessities.

The most important valid contracts of an infant—that is, contracts which cannot be avoided by him—are his contracts for necessities. The privilege of avoiding his contracts, which the law recognizes in certain cases, is for the protection of the infant, and there is no reason to relieve him from his contracts for necessities. On the contrary, it might be a great hardship if he could not pledge his credit for necessities. Accordingly, the cases are uniform in holding infants bound to a certain extent by such contracts. An infant is also liable for necessities supplied his wife,⁴³ on the theory that he is answerable for her support; and he has also been

⁴³ *Turner v. Trisby*, 1 Strange, 168; *Chapple v. Cooper*, 13 Mees. & W. 252; *Cantine v. Phillips' Adm'r*, 5 Har. (Del.) 428; *People v. Moores*, 4 Denio (N. Y.) 518. Or family, *Chapman v. Hughes*, 61 Miss. 339; *Price v. Sanders*, 60 Ind. 310.

held liable for necessities supplied his child.⁴⁴ His liability for his child's necessities must be based on the parent's duty of support; and in England, and in some states in this country, where it is held that a parent is under no common-law duty to support his children,⁴⁵ a parent, in the absence of some contract, express or implied, is not liable for their necessities.⁴⁶ The principal items included under infant's necessities are his food, clothing, lodging, medical attendance, and education.⁴⁷ Accordingly, an infant has been held liable for board supplied him;⁴⁸ for food and lodging at an hotel;⁴⁹ for clothing,⁵⁰ medicine,⁵¹ a horse, where horseback exercise was prescribed by a physician;⁵² for dentist's services;⁵³ and for a common-school education.⁵⁴ Though it has been said that a college education cannot be a necessary,⁵⁵ there would seem to be no reason why a college education might not be classed as a

⁴⁴ *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; *Ex parte Ryder*, 11 Paige (N. Y.) 185.

⁴⁵ *Ante*, p. 230.

⁴⁶ "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle or a mere stranger would be." Lord Abinger, C. B., in *Mortimore v. Wright*, 6 Mees. & W. 481. *Accord*, *Shelton v. Springett*, 11 C. B. 452; *Kelley v. Davis*, 49 N. H. 187; *Gordon v. Potter*, 17 Vt. 348.

⁴⁷ Co. Litt. 172a; *Reeve*, Dom. Rel. 285; *Schouler*, Dom. Rel. § 411.

⁴⁸ *Bradley v. Pratt*, 23 Vt. 378; *Barnes v. Barnes*, 50 Conn. 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *Squler v. Hydliff*, 9 Mich. 274. But, when undergraduates were supplied by the college with what is generally necessary, dinners supplied at private rooms were held, *prima facie*, not necessities. *Wharton v. Mackenzie*, 5 Q. B. 606; *Brooker v. Scott*, 11 Mees. & W. 67.

⁴⁹ *Watson v. Cross*, 2 Duv. (Ky.) 147.

⁵⁰ *Makarell v. Bachelor*, Cro. Eliz. 583; *Saunders v. Ott*, 1 McCord (S. C.) 572. But not for clothing to an unnecessary amount. *Burghart v. Angerstein*, 6 Car. & P. 690; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80.

⁵¹ *Saunders v. Ott*, 1 McCord (S. C.) 572; *Werner's Appeal*, 91 Pa. St. 222.

⁵² *Hart v. Prater*, 1 Jur. 623; *Cornelia v. Ellis*, 11 Ill. 585.

⁵³ *Strong v. Foote*, 42 Conn. 203.

⁵⁴ Co. Litt. 172; *Middlebury College v. Chandler*, 16 Vt. 686; *Price v. Sanders*, 60 Ind. 310; *Pickering v. Gunning*, W. Jones, 182. Board while at school, *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176.

⁵⁵ *Middlebury College v. Chandler*, 16 Vt. 689. So, also, *Gayle v. Hayes' Adm'r*, 79 Va. 542; *Smith*, Cont. 269.

necessary, if suitable to the infant's situation in life. As was said in an English case: "A knowledge of the learned languages may be necessary for one; a mere knowledge of reading and writing may be sufficient for another."⁵⁶ Yet a professional education has been held not to be a necessary,⁵⁷ although the opposite has been held as to instruction in a trade.⁵⁸

An infant's necessities vary according to the person. They are not restricted to what is necessary to support life, but extend to articles fit to maintain the particular person, in the state, situation, and degree in life in which he is.⁵⁹ In *Hands v. Slaney*,⁶⁰ Lord Kenyon said: "But, as to the other article furnished,—namely, the livery,—I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and, if it was proper for him to have one, it was equally necessary that the servant should have a livery. The general rule is clear that infants are liable for necessities, according to their degree and station in life." In a Massachusetts case⁶¹ it was said: "It would be difficult to lay down any general rule upon this subject, and to say what would or what would not be necessities. It is a flexible, and not an absolute, term, having relation to the infant's condition in life, to the habits and pursuits of the place in which, and the people among whom, he lives, and to the changes in those habits and pursuits occurring in the progress of society. Articles which are purely ornamental are not necessities, though, if useful as well as ornamental, they may be, if necessary to support the infant properly in his station in life."⁶² "Articles of mere luxury are always excluded, though luxurious articles of utility are in some

⁵⁶ *Peters v. Fleming*, 6 Mees. & W. 42.

⁵⁷ *Turner v. Gaither*, 83 N. C. 357; *Bouchell v. Clary*, 3 Brev. (S. C.) 194. Nor religious instruction. *St. John's Parish v. Bronson*, 40 Conn. 75.

⁵⁸ *Cooper v. Simmons*, 7 Hurl. & N. 707.

⁵⁹ Parke, B., in *Peters v. Fleming*, 6 Mees. & W. 42; *Hands v. Slaney*, 8 Term R. 578; *Ryder v. Wombwell*, L. R. 4 Exch 32; *Coates v. Wilson*, 5 Esp. 152; *McKanna v. Merry*, 61 Ill. 177; *Jordan v. Coffield*, 70 N. C. 110; *Nicholson v. Spencer*, 11 Ga. 607.

⁶⁰ 8 Term R. 578.

⁶¹ *Breed v. Judd*, 1 Gray (Mass.) 455.

⁶² *Peters v. Fleming*, *supra*.

cases allowed.”⁶³ Likewise, those things which contribute only to enjoyment, as a journey taken for pleasure, cannot be considered as necessities.⁶⁴

To come under the head of necessities, the articles supplied an infant must be suitable to his estate and degree, not only in point of quality, but also in point of quantity;⁶⁵ and if a minor is already supplied, no matter from what quarter, any further supply of goods of the same description will not be necessities.⁶⁶ Where a minor is living with parent or guardian who provides the real necessities of life, the minor cannot bind himself for what might ordinarily be classed as his necessities, for the parent or guardian has the right to decide in what way the minor shall live;⁶⁷ and, when a minor is so residing, a presumption arises, rebuttable by proof, that he is supplied with necessities.⁶⁸

Among necessities can be included only such things as concern the person, and not the estate. As was said in a Massachusetts case:⁶⁹ “The wants to be supplied are, however, personal,—either

⁶³ *Chapple v. Cooper*, 13 Mees. & W. 252.

⁶⁴ *Harrison v. Fane*, 1 Man. & G. 550; *McKanna v. Merry*, 61 Ill. 179; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891; *Saunders v. Ott*, 1 McCord (S. C.) 572; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Howard v. Simpkins*, 70 Ga. 322.

⁶⁵ *Burghart v. Angerstein*, 6 Car. & P. 690; *Johnson v. Lines*, 6 Watts & S. 80; *Nicholson v. Spencer*, 11 Ga. 607.

⁶⁶ *Burghart v. Angerstein*, *supra*; *Barnes v. Toye*, 13 Q. B. Div. 410; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Nicholson v. Wilborn*, 13 Ga. 467; *Perrin v. Wilson*, 10 Mo. 451; *Guthrie v. Murphy*, 4 Watts (Pa.) 80. But see *Ryder v. Wombwell*, L. R. 3 Exch. 90. An infant who has an allowance sufficient to supply himself with necessities has been held not to be liable for articles supplied on credit. *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274. For collection of cases on this point, see *Ewell*, *Lead. Cas.* note pp. 63, 64.

⁶⁷ 2 Kent, Comm. 240; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Hoyt v. Casey*, 114 Mass. 397; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Elrod v. Myers*, 2 Head (Tenn.) 33; *Jones v. Colvin*, 1 McMul. (S. C.) 14; *Perrin v. Wilson*, 10 Mo. 451; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; *Kraker v. Byrum*, 13 Rich. Law (S. C.) 163.

⁶⁸ *Connolly v. Hull's Assignees*, 3 McCord (S. C.) 6; *Perrin v. Wilson*, 10 Mo. 451; *Freeman v. Bridger*, 4 Jones (N. C.) 1.

⁶⁹ *Tupper v. Cadwell*, 12 Mete. (Mass.) 559.

those for the body, as food, clothing, lodging, and the like; or those necessary for the proper cultivation of the mind." Articles used by him in business are not necessities, although essential thereto. "His buying to maintain his trade, although he gain thereby his living, shall not bind him."⁷⁰ Building material used in the erection of a house on the infant's land does not come under the head of necessities,⁷¹ and a mechanic's lien therefor cannot be enforced against the property.⁷² On the same principle, an infant cannot contract for repairs to be made on his real estate, though necessary to prevent immediate injury;⁷³ nor for protection by insurance against fire;⁷⁴ nor for legal services to protect his property,⁷⁵ though he would be liable for such services in defending him on a criminal charge.⁷⁶

An infant is liable for money expended in payment of necessities furnished to him, but not for money supplied to him, to be by him expended, although it is actually laid out for necessities.⁷⁷ "The reason for this distinction is that in the latter case the con-

⁷⁰ *Whittingham v. Hill*, Cro. Jac. 494. *Accord*, *Dilk v. Keighley*, 2 Esp. 480; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Paul v. Smith*, 41 Mo. App. 275; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891; *Decell v. Lewenthal*, 57 Miss. 331; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557.

⁷¹ *Freeman v. Bridger*, 4 Jones (N. C.) 1; *Wornock v. Loar* (Ky.) 11 S. W. 438.

⁷² *Jones, Liens*, § 1239; *Price v. Jennings*, 62 Ind. 111; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039.

⁷³ *Tupper v. Cadwell*, 12 Metc. (Mass.) 559; *Wallis v. Bardwell*, 126 Mass. 366; *Phillips v. Lloyd* (R. I.) 25 Atl. 909; *West v. Gregg's Adm'r*, 1 Grant, Cas. (Pa.) 53.

⁷⁴ *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345.

⁷⁵ *Phelps v. Worcester*, 11 N. H. 51. But see *Epperson v. Nugent*, 57 Miss. 45. Money advanced to pay off a prior mortgage is not a necessary. *Magee v. Welsh*, 18 Cal. 155; *Bicknell v. Bicknell*, 111 Mass. 265; *West v. Gregg's Adm'r*, 1 Grant, Cas. (Pa.) 53.

⁷⁶ *Barker v. Hibbard*, 54 N. H. 539; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101. In *Munson v. Washband*, 31 Conn. 303, attorney's services in a civil suit were held necessities.

⁷⁷ *Ellis v. Ellis*, 5 Mod. 368; *Earle v. Peale*, 10 Mod. 67; *Clarke v. Leslie*, 5 Esp. 28; *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176; *Randall v. Sweet*, 1 Denio (N. Y.) 460; *Swift v. Bennett*, 10 Cush. (Mass.) 438; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Genereux v. Sibley* (R. I.) 25 Atl. 345; *Haine v. Tarrant*, 1 Hill (S. C.) 400; *Conn v. Coburn*, 7 N. H. 368.

tract arises upon the lending, and that the law will not support contracts which are to depend for their validity upon a subsequent contingency." ⁷⁸ This objection does not arise, however, where the lender applies the money himself, or sees it applied, to the purchase of necessities; and in such case the infant is bound. ⁷⁹ In equity, however, the infant is liable for money borrowed to pay for necessities, when it is so applied, even by the infant, because the lender by subrogation stands in the place of the person paid. ⁸⁰

What are necessities is a mixed question of law and fact. It is for the court to say whether the articles in question can be necessities, and for the jury to say whether they are. ⁸¹ As was said in a Massachusetts case: "It is the well-settled rule that it is the province of the court to determine whether the articles sued for are within the class of necessities, and, if so, it is the proper duty of the jury to pass upon the question of the quantity, quality, and their adaptation to the condition and wants of the infant." ⁸²

An infant is not only liable on his contract for necessities, but, the contract being one implied in law, he is liable without any express contract. Moreover, his express contract which is other than the contract implied in law will not bind him. For instance, the law implies an agreement on his part to pay what the necessities are reasonably worth, and his agreement to pay more is voidable; ⁸³ and for the same reason he may avoid any contract for necessities

⁷⁸ *Swift v. Bennett*, 10 Cush. (Mass.) 438. *Accord*, *Earle v. Peale*, 10 Mod. 67.

⁷⁹ *Smith v. Oliphant*, 2 Sandf. (N. Y.) 306; *Randall v. Sweet*, 1 Denio (N. Y.) 460.

⁸⁰ *Marlow v. Pitfield*, 1 P. Wms. 558; *Price v. Sanders*, 60 Ind. 310; *Hickman v. Hall's Adm'rs*, 5 Litt. (Ky.) 338.

⁸¹ *Anson*, Cont. 111, 112; *Clark*, Cont. 237; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *McKanna v. Merry*, 61 Ill. 177; *Jordan v. Coffield*, 70 N. C. 110; 1 Pars. Cont. 296, and cases in note v.

⁸² *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

⁸³ *Earle v. Reed*, 10 Metc. (Mass.) 387; *Davis v. Gay*, 141 Mass. 531, 6 N. E. 549; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Parsons v. Keys*, 43 Tex. 557; *Hyer v. Hyatt*, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977; *Dubose v. Wheddon*, 4 McCord (S. C.) 221; *Locke v. Smith*, 41 N. H. 346. In *Stone v. Dennison*, 13 Pick. (Mass.) 1, when an infant entered into an agreement to labor until of age, in consideration of being furnished with board, clothing, and education, it was held that, the agreement being fair and reasonable when en-

the consideration of which cannot be inquired into. Some cases go so far as to hold that negotiable paper given for necessities, even as between the original parties, is voidable, though the consideration can be inquired into, since it could not be inquired into if it should pass into an innocent third party's hands for value.⁸⁴ There are other cases which hold that a note given for necessities is merely voidable as between the original parties, since the consideration is open to inquiry, and that the value of the articles can be ascertained, and judgment given *pro tanto*.⁸⁵

SAME—RATIFICATION AND DISAFFIRMANCE.

197. A promise to perform an isolated act, or a contract that is wholly executory, is of no validity until it has been ratified; but an executed contract, or a contract that involves continuous rights and obligations, is valid until it has been disaffirmed.

Some voidable contracts of an infant bind him unless he disaffirms them, while others do not bind him unless he ratifies them. A promise to perform some isolated act, or a contract that is wholly executory, has no effect until it is ratified. On the other hand, voidable contracts which are wholly or partially executed, and contracts involving continuing rights and obligations, need no ratification, but are binding until they are disaffirmed. In other words, it may be laid down as a general rule that when an interest in property of a fixed and permanent nature is vested either in the infant, or in the other party to the contract, under an executed contract, as by a

tered into, the infant could not maintain a quantum meruit for his services, on their turning out to be worth more than the agreed compensation.

⁸⁴ *Williamson v. Watts*, 1 Camp. 552; *Trueman v. Hurst*, 1 Term R. 40; *In re Soltykoff* [1891] 1 Q. B. 413; *Swasey v. Vanderheyden*, 10 Johns. (N. Y.) 33; *Fenton v. White*, 4 N. J. Law, 111; *M'Minn v. Richmonds*, 6 Yerg. (Tenn.) 9; *Bouchell v. Clary*, 3 Brev. (S. C.) 194; *McCrillis v. How*, 3 N. H. 348; *Henderson v. Fox*, 5 Ind. 489; *Morton v. Steward*, 5 Ill. App. 533.

⁸⁵ *Earle v. Reed*, 10 Metc. (Mass.) 387; *Bradley v. Pratt*, 23 Vt. 378; *Dubose v. Wheddon*, 4 McCord (S. C.) 221; *Conn v. Coburn*, 7 N. H. 368; *Aaron v. Harley*, 6 Rich. Law (S. C.) 26; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101; *Guthrie v. Morris*, 22 Ark. 411.

conveyance of real estate or transfer of personal property, or when the infant enters into a continuing contractual relation, as where he becomes a partner or a stockholder, there must be some distinct act of disaffirmance on the part of the infant to avoid the contract. Thus, conveyances of land to an infant are valid until disaffirmed; and an infant lessee of land becomes liable, until disaffirmance, for all obligations attached to the estate, as to pay rent under a lease rendering rent,⁸⁶ and, when he continues in possession after becoming of age, he is chargeable with the arrears which have accrued during his minority.⁸⁷ An important class of contracts which are binding upon an infant until he disaffirms them are his sales and conveyances of real estate. His conveyances pass a good title to the purchaser, subject only to be divested by his disaffirmance.⁸⁸ And the vendee may convey his title to some one else, subject to the infant's right of disaffirmance.⁸⁹

When an infant enters into a partnership, he contracts a continuing obligation, and must disaffirm the relation on reaching his majority, or he will remain a partner, and be liable as such. His mere failure to disaffirm will render him liable for the debts of the firm contracted subsequent to his becoming of age, without proof of any act on his part as a partner after his majority.⁹⁰ But, to render him liable for debts of the firm contracted during his minority, there must be a ratification of them, express or implied.⁹¹ His mere failure to disaffirm on reaching his majority, without proof of subsequent acts as a partner, will not constitute a ratification,

⁸⁶ *Bottiller v. Newport*, 21 Hen. VI. p. 31; *Northwestern Ry. Co. v. McMichael*, 5 Exch. 114, 123; *Ketsey's Case*, Cro. Jac. 320. But see, contra, *Flexner v. Dickerson*, 72 Ala. 318.

⁸⁷ *Bac. Abr.* "Infancy and Age," (1) 8; *Rolle, Abr.* 731.

⁸⁸ *Irvine v. Irvine*, 9 Wall. 617; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Tunison v. Chamblin*, 88 Ill. 378; *Dixon v. Merritt*, 21 Minn. 196; *Scranton v. Stewart*, 52 Ind. 68; *Green v. Green*, 69 N. Y. 553; and cases in notes 176-178, post.

⁸⁹ *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 340; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372; *Miles v. Lingerman*, 24 Ind. 385; *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁹⁰ *Goode v. Harrison*, 5 Barn. & Ald. 147.

⁹¹ *Tobey v. Wood*, 123 Mass. 88; *Todd v. Clapp*, 118 Mass. 495; *Bush v. Linthicum*, 59 Md. 344.

but failure to disaffirm, followed by acts as a partner, may. We will consider this further when we come to ascertain what constitutes a ratification.⁹²

A further illustration of an infant's contract which requires some act of disaffirmance to avoid it is the position of an infant who has become a stockholder in a corporation. "In the cases already decided upon this subject, infants having become shareholders in railway companies have been held liable to pay calls made whilst they were infants. They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are persons who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, * * * and with certain obligations attached to it which they are bound to discharge, * * * unless they have elected to waive or disagree to the purchase altogether."⁹³ When an infant has become a stockholder, he may repudiate the contract before or after majority;⁹⁴ but he must disaffirm within a reasonable time after his majority, or he will be held to have ratified the contract,⁹⁵ and will be liable for calls.⁹⁶

SAME—TIME OF AVOIDANCE

198. Executory contracts or executed contracts relating to personalty may be avoided by an infant either before or after attaining his majority; but conveyances of real estate cannot be avoided during minority, though he may enter and take the profits.

199. As a rule, mere lapse of time after attaining his majority will not bar an infant's disaffirmance of

⁹² Post, p. 382.

⁹³ Parke, B., in *London & N. W. Ry. Co. v. McMichael*, 20 Law J. Exch. 97, 5 Exch. 114.

⁹⁴ *London & N. W. Ry. Co. v. McMichael*, 20 Law J. Exch. 97; *Ebbetts' Case*, 5 Ch. App. 302; *Lumsden's Case*, 4 Ch. App. 31. See Cook, Stock & S. §§ 66, 250, 318, for collection of cases on infant stockholders.

⁹⁵ *Lumsden's Case*, supra; *Cork & B. Ry. Co. v. Cazenove*, 10 Q. B. 935; *Ebbetts' Case*, supra; *Mitchell's Case*, L. R. 9 Eq. 363.

⁹⁶ *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181.

his executory contract, but in a few states he is required to disaffirm within a reasonable time.

200. As a rule, executed contracts must be disaffirmed within a reasonable time after attaining majority; but in some states it is held that the right to avoid a conveyance of real estate is not barred by acquiescence for any period short of that prescribed by the statute of limitations.

In this section we are to consider the time within which an infant may avoid his contracts, and the time within which he must avoid them. An infant's executory contract may be avoided by him at any time, either before or after attaining his majority, by refusing to perform it, and pleading his infancy when sued for a breach of it.⁹⁷ In the case of executed contracts, a distinction is made between contracts relating to his real estate and contracts relating to his personality. A conveyance of his land by an infant cannot be disaffirmed during his minority. He may enter on the land, and take the profits until the time arrives when he has the legal capacity to affirm or disaffirm the conveyance. But the conveyance is not rendered void by the entry. It may still be affirmed after he reaches his majority.⁹⁸

This rule does not apply to a sale and manual delivery of chattels by an infant. Such a contract may be avoided by him while he is still an infant. In *Stafford v. Roof*,⁹⁹ a leading New York case, it was said: "The general rule is that an infant cannot avoid his contract, executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall

⁹⁷ *Reeve*, Dom. Rel. 254; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Ray v. Haines*, 52 Ill. 485; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Petty v. Roberts*, 7 Bush. (Ky.) 410.

⁹⁸ *Welch v. Bunce*, 83 Ind. 382; *Zouch v. Parsons*, 3 Burrows, 1794; *Irvine v. Irvine*, 5 Minn. 61 (Gil. 44); *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Hastings v. Dollarhide*, 24 Cal. 195; *Baker v. Kennett*, 54 Mo. 88; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *McCormic v. Leggett*, 8 Jones (N. C.) 425.

⁹⁹ 9 Cow. (N. Y.) 626.

not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land, —a case in which he may enter and receive the profits until the power of finally avoiding shall arrive. * * * Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be that, where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately.”¹⁰⁰ The rule is very general, almost universal, that an infant may avoid any contract in relation to his personal property before he is of age.¹⁰¹ Some courts have held that he cannot avoid a partnership agreement, and recover what he has put into the firm, until he attains his majority.¹⁰² Other courts hold the contrary, on the ground that it is a contract in relation to his personalty, and that all contracts of an infant in relation to his personal property may be disaffirmed during his minority.¹⁰³

As to whether a contract must be disaffirmed by an infant within

¹⁰⁰ *Reeve*, Dom. Rel. 254; *Schouler*, Dom. Rel. 409; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Price v. Furman*, 27 Vt. 268; *Hoyt v. Wilkinson*, 57 Vt. 404; *Riley v. Mallory*, 33 Conn. 201; *Carr v. Clough*, 26 N. H. 280; *Towle v. Dresser*, 73 Me. 252; *Willis v. Twambly*, 13 Mass. 204; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354); *Carpenter v. Carpenter*, 45 Ind. 142. But see *Armitage v. Widoe*, 36 Mich. 124. And see the cases cited in *Clark*, Cont. 245.

¹⁰¹ See *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Price v. Furman*, 27 Vt. 268; *Hoyt v. Wilkinson*, 57 Vt. 404; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. (N. Y.) 628; *Boal v. Mix*, 17 Wend. (N. Y.) 119; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354).

¹⁰² *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Widoe*, 36 Mich. 130; *Bush v. Linthicum*, 59 Md. 344. But see *Adams v. Beall*, 67 Md. 53, 8 Atl. 664.

¹⁰³ *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Adams v. Beall*, *supra*.

a reasonable time after he attains his majority, the authorities are conflicting. In the case of executory contracts requiring ratification to render them binding, the right to avoid them cannot be barred by mere silence, without more. But it may be otherwise where the circumstances are such as to make it the infant's duty to speak, for in such a case silence or acquiescence may amount to a ratification.¹⁰⁴ In the case of those contracts which require disaffirmance after the infant becomes of age,¹⁰⁵ such as conveyances of land, sales and delivery of chattels, and the like, the infant must, according to the weight of authority, disaffirm the contract within a reasonable time after he attains his majority, or it cannot be avoided at all.¹⁰⁶ Many courts, however, hold that a conveyance of land by an infant need not be disaffirmed within any period short of that prescribed by the statute of limitations, and that acquiescence for any shorter time will not bar his right to avoid it.¹⁰⁷ In some states it is provided by statute that an infant is bound by all his contracts unless he disaffirms them within a reasonable time.¹⁰⁸

SAME—WHO MAY AVOID CONTRACT.

201. The privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity. On his death, or if he becomes

¹⁰⁴ Post, p. 385.

¹⁰⁵ Ante, p. 374.

¹⁰⁶ *Delano v. Blake*, 11 Wend. (N. Y.) 85; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283 (collecting the cases); *Bigelow v. Kinney*, 3 Vt. 353; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Har. (Del.) 75; *Hastings v. Dollarhide*, 24 Cal. 195; *Scott v. Buchanan*, 11 Humph. (Tenn.) 467; *Harris v. Cannon*, 6 Ga. 382; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805. And see other cases cited in *Clark, Cont.* 247.

¹⁰⁷ *Drake's Lessee v. Ramsay*, 5 Ohio, 251; *Prout v. Willey*, 28 Mich. 164; *Sims v. Everhardt*, 102 U. S. 300; *Irvine v. Irvine*, 9 Wall. 617; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Boody v. McKenney*, 23 Me. 517; *Richardson v. Pate*, 93 Ind. 423; *Wells v. Seixas*, 24 Fed. 82, and note collecting cases; and cases cited in *Clark, Cont.* 247.

¹⁰⁸ *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. 109; *Johnson v. Storle*, 32 Neb. 610, 49 N. W. 371.

insane, his right of avoidance passes to his heirs, personal representatives, or conservator, or guardian.

202. The other party to the contract, not being himself under disability, is bound if the infant chooses to hold him.

The right to avoid a contract on the ground of infancy is a right given to the infant for his protection. It is a personal privilege, and during his life and sanity the infant alone can take advantage of it.¹⁰⁹ Thus, where an infant payee of a negotiable note transferred it by indorsement to a third party, and the maker subsequently paid the note to the infant, and pleaded such payment in a suit against him by the indorsee, it was held that he could not avoid the infant's indorsement.¹¹⁰ So, in an action for enticing away a servant, it was held that the defendant could not escape liability by showing that the servant was an infant, and therefore was not bound by the contract of service.¹¹¹

The right to avoid a contract on the ground of infancy does not pass to an assignee of the infant, and this is for the same reason.¹¹² Thus, where an assignee in insolvency sought the aid of a court of equity to relieve his assignor's estate from the incumbrance of a mortgage executed while the assignor was an infant, it was held that, since the right of avoidance was for the infant's protection, he alone could have the benefit of it, and that the right did not pass to the assignee.¹¹³ Though there are a number of cases to the contrary,¹¹⁴

¹⁰⁹ *Keane v. Boycott*, 2 H. Bl. 511; *Nightingale v. Withington*, 15 Mass. 272; *Clark*, Cont. 242, and cases there cited.

¹¹⁰ *Nightingale v. Withington*, *supra*.

¹¹¹ *Keane v. Boycott*, *supra*.

¹¹² *Whittingham's Case*, 8 Coke, 43; *Austin v. Trustees*, 8 Metc. (Mass.) 196, 203; *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Levering v. Heighe*, 2 Md. Ch. 81; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Tyler*, Inf. § 19.

¹¹³ *Mansfield v. Gordon*, *supra*.

¹¹⁴ *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280. See *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, for discussion of this question, and *Ewell*, Lead. Cas. 90, for collection of authorities.

it has often been held that the right of avoidance does not pass to those who are the infant's privies in estate.¹¹⁵ If the infant becomes insane, his right to avoid his contracts passes to his guardian or conservator;¹¹⁶ and, by the weight of authority, on his death, the right passes to his heirs¹¹⁷ or his personal representatives.¹¹⁸ The reason of the rule extends only to them, it has been said, because the privilege is conferred for the sole benefit of the infant. While living, he should be the exclusive judge of that benefit; and, when he is dead, those alone should interfere who legally represent him. If his contracts could be avoided by third persons, the principle would operate, not for his, but for their, benefit; not when he chose to avail himself of his privileges, but when strangers elected to do it.

The other party to the contract, if he is not under any disability himself, cannot avoid it, either on the ground of the other's infancy, or on the ground that there is no mutuality.¹¹⁹ He is bound if the infant chooses to hold him. A court of equity, however, will not grant an infant specific performance of the contract by the adult, for it does not exercise its power to compel specific performance, unless there is mutuality of remedy.¹²⁰ What has been said above applies, of course, only to the voidable contracts of infants. A contract which is held to be void is an absolute nullity, and may be attacked by any one.

¹¹⁵ Whittingham's Case, 8 Coke, 43; Austin v. Trustees, 8 Metc. (Mass.) 196; Hoyle v. Stowe, 2 Dev. & B. (N. C.) 320; Harris v. Ross, 112 Ind. 314, 13 N. E. 873; Singer Manuf'g Co. v. Lamb, 81 Mo. 221; Levering v. Heighe, 2 Md. Ch. 81.

¹¹⁶ Chandler v. Simmons, 97 Mass. 508.

¹¹⁷ Bac. Abr. "Infancy and Age" (I) 6; Tyler, Inf. § 19; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Levering v. Heighe, 2 Md. Ch. 81; Harvey v. Briggs, 68 Miss. 60, 8 South. 274; Veal v. Fortson, 57 Tex. 482.

¹¹⁸ Tyler, Inf. § 16; Ewell, Lead. Cas. 90, with collection of cases.

¹¹⁹ Bac. Abr. "Infancy and Age" (I) 4; 2 Kent, Comm. 236.

¹²⁰ Flight v. Bolland, 4 Russ. 298.

SAME—WHAT CONSTITUTES RATIFICATION.

203. In some jurisdictions, by statute, ratification of a contract by an infant must be in writing. In the absence of such a provision, ratification may be by an express new promise, either written or oral, or, by the weight of authority, it may be implied from declarations or conduct showing an intention to adopt the contract as binding.
204. By the weight of authority, the promise must be made or the acts done by the infant with knowledge of his legal right to avoid the contract.

In some jurisdictions it has been expressly provided by statute that, except in certain cases, no action shall be maintained on any contract made by an infant, unless he, or some person lawfully authorized, shall have ratified it in writing after he attained his majority.¹²¹

In the absence of such a provision as this,—and it exists in very few jurisdictions,—there need be no writing at all to constitute a ratification of a contract made by an infant. Ratification may be by words or by acts. As to the sufficiency of particular words or acts to constitute a ratification, the authorities are not agreed. On the contrary, there is an irreconcilable conflict in the decisions, and what would be sufficient in one state might not be so in another. The importance of this branch of our subject, and the uncertainty in the decisions, require that it be considered at some length. The authorities seem to agree that there must be a new promise by the infant after he attains his majority. They also seem to agree, however, that there need not be an express promise, but that the promise may be implied from his declarations or his conduct, just as an original promise may be implied from words or conduct. The con-

¹²¹ It was so provided by the English statute, 9 Geo. IV. c. 14, § 5, known as "Lord Tenderden's Act." This statute has been repealed by 38 & 39 Vict. c. 66. There are similar provisions in a few of our states. See *ThurLOW v. Gilmore*, 40 Me. 378.

flict in the cases is as to the inference to be drawn from particular acts or declarations.

Many of the courts hold that a mere acknowledgment of the contract or debt, whether by words or by acts, as by a part payment, which would be sufficient to revive a debt barred by the statute of limitations, will not constitute a ratification, but that there must be a new promise.¹²² It was said by the Massachusetts court: "By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is that a mere acknowledgment avoids the presumption of payment which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration on his part is necessary to defeat his power of avoiding it."¹²³ This rule is clearly right if it is intended to hold that a mere acknowledgment that the contract was made by the infant is not a ratification; but it is not sound if it is intended to hold that an infant does not ratify his contract by acknowledging, after he has attained his majority, that it is then binding upon him. This is a ratification.¹²⁴ By the great weight of opinion, the question is, in all cases, whether the words or acts of the infant after he has attained his majority show an intention on his part to adopt the contract as binding upon him,

¹²² *Edmunds v. Mister*, 58 Miss. 765; *Whitney v. Dutch*, 14 Mass. 457; *Smith v. Mayo*, 9 Mass. 62; *Thrupp v. Fielder*, 2 Esp. 628; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Hale v. Gerrish*, 8 N. H. 374; *Tibbets v. Gerrish*, 25 N. H. 41; *Wilcox v. Roath*, 12 Conn. 550; *Catlin v. Haddox*, 49 Conn. 492; *Stokes v. Brown*, 3 Pin. (Wis.) 311; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Fetrow v. Wiseman*, 40 Ind. 148. In *Edmunds v. Mister*, *supra*, it was said that executory contracts of infants "can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. The contract made during minority will furnish the consideration, but it will furnish nothing more. All else must be supplied by the new agreement. A mere acknowledgment of the debt is not sufficient, but there must be an express promise to pay, voluntarily made."

¹²³ *Whitney v. Dutch*, *supra*.

¹²⁴ *Henry v. Root*, 33 N. Y. 526; *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 South. 399; *Little v. Duncan*, 9 Rich. Law (S. C.) 55.

and, if they do show such an intention, a new promise or ratification is to be implied.¹²⁵ As was said by the Vermont court in a late case: "Where the declarations or acts of the individual after becoming of age fairly and justly lead to the inference that he intended to, and did, recognize and adopt as binding an agreement executory on his part, made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable."¹²⁶ So, in a late Massachusetts case, it was said: "Ratification may be shown either by proof of an express promise to pay the debt, made by the infant after he became of age, or by proof of such acts of the infant, after he became of age, as fairly and justly lead to the inference that he intended to ratify the contract, and pay the debt."¹²⁷ And in an English case it was said: "Any act or declaration which recognizes the existence of the promise as binding is a ratification of it."¹²⁸

To illustrate: It has been held, and very properly, that a mortgage given by an infant is ratified by payment of the interest coupon notes after becoming of age,¹²⁹ and that giving a watch in part payment of a note executed during minority is a ratification of the note.¹³⁰ This is clearly a recognition of the contract, not merely as having been made, but as binding. So, it has been held that bringing a suit to enforce payment of a note is a ratification of the contract in which the note was given.¹³¹

The cases are uniform to the effect that, where an infant pur-

¹²⁵ *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791; *Tobey v. Wood*, 123 Mass. 88; *Harris v. Wall*, 1 Exch. 130; *Henry v. Root*, *supra*; *Middleton v. Hoge*, 5 Bush. (Ky.) 478; *Baker v. Kennett*, 54 Mo. 88; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 62; *Hale v. Gerrish*, 8 N. H. 374; *Emmons v. Murray*, 16 N. H. 385; *Drake v. Wise*, 36 Iowa, 476; *Thomasson v. Boyd*, 13 Ala. 419.

¹²⁶ *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791.

¹²⁷ *Tobey v. Wood*, 123 Mass. 88.

¹²⁸ *Harris v. Wall*, 1 Exch. 130.

¹²⁹ *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 South. 399. *Contra*, *Rapid Transit Land Co. v. Sanford* (Tex. Civ. App.) 24 S. W. 587.

¹³⁰ *Little v. Duncan*, 9 Rich. (S. C.) 55.

¹³¹ *Morrill v. Aden*, 19 Vt. 505.

chases or otherwise acquires property under a contract, he ratifies the contract if he retains and uses the property after he becomes of age, or if he disposes of it by sale, mortgage, or otherwise. The reason of this is that he cannot honestly retain or dispose of the property except upon the assumption that the contract by which he acquired it is valid, and therefore such conduct, if unexplained, fairly and justly leads to the inference of a promise or undertaking, after becoming of age, to pay for the property.¹³² The New York court even went so far as to hold, in applying this doctrine, that where an infant, who had taken the note of a third person in payment for work, retained the note for eight months after attaining his majority before offering to return it, and in the meantime the maker of the note became insolvent, such retention of the note was a ratification of the contract under which it was taken.¹³³

Acquiescence after majority, if for an unreasonable time, is held in some jurisdictions to amount to a ratification of certain contracts requiring disaffirmance;¹³⁴ but, in the case of executory contracts, mere silence or acquiescence, unaccompanied by acts indicating an intention to abide by the contract, will not amount to a ratification.¹³⁵ While in many jurisdictions, as has been seen, mere acquiescence is not evidence of the affirmance of an infant's deed,¹³⁶ yet, where this is accompanied by other circumstances indicating a clear intention to confirm, the deed cannot thereafter

¹³² *Tobey v. Wood*, 123 Mass. 89; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Chandler v. Simmons*, 97 Mass. 508; *Smith v. Kelley*, 13 Metc. (Mass.) 309; *Aldrich v. Grimes*, 10 N. H. 194; *Robbins v. Eaton*, Id. 561; *Lawson v. Lovejoy*, 8 Me. 405; *Boody v. McKenney*, 23 Me. 517; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791; *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Cheshire v. Barrett*, 4 McCord (S. C.) 241. If the retention, use, or disposal of the property is not inconsistent with the repudiation of the contract, there is no ratification. *Todd v. Clapp*, 118 Mass. 495; *Tobey v. Wood*, 123 Mass. 88; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891. Thus, retention of the property, after tendering it and being met by a refusal, is not to be construed as a ratification. *House v. Alexander*, *supra*.

¹³³ *Delano v. Blake*, 11 Wend. (N. Y.) 85. And see *Thomasson v. Boyd*, 13 Ala. 419.

¹³⁴ *Ante*, p. 379.

¹³⁵ *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Tyler v. Gallop's Estate*, 68 Mich. 185, 35 N. W. 902; *Tobey v. Wood*, 123 Mass. 88.

¹³⁶ *Ante*, p. 379.

be disaffirmed.¹³⁷ Thus, when a person who has conveyed land during minority stands by and sees his grantee make extensive improvements upon the land, he loses his right to disaffirm.¹³⁸ When an infant gives a lease of lands, and, after majority, accepts rent, this will amount to a ratification of the lease,¹³⁹ and acceptance after majority of the proceeds of a sale of real estate is a ratification of the conveyance.¹⁴⁰ If an infant purchases or exchanges land, and remains in possession after majority, this will constitute an affirmance of the contract.¹⁴¹ Likewise, the sale after majority of land purchased by an infant,¹⁴² or its continued use and occupation,¹⁴³ is a ratification of a mortgage given to secure the purchase money; and this is true although the mortgage is given to a third person, provided the conveyance and mortgage are made at the same time, so as to constitute one transaction.¹⁴⁴ If an infant

¹³⁷ 1 Pars. Cont. 323; *Tucker v. Moreland*, 10 Pet. 58; *Irvine v. Irvine*, 9 Wall. 617.

¹³⁸ *Wallace v. Lewis*, 4 Har. (Del.) 75; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 62; *Davis v. Dudley*, 70 Me. 236; *Hartman v. Kendall*, 4 Ind. 403; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. 114. But see *Brantley v. Wolf*, 60 Miss. 420.

¹³⁹ *Ashfeild v. Ashfield*, W. Jones, 157; *Paramour v. Yardley*, Plowd. 539, 545a; *Wimberly v. Jones*, 1 Ga. Dec. 91.

¹⁴⁰ *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542; *Pursley v. Hays*, 17 Iowa, 310; *Davidson v. Young*, 38 Ill. 145; *Ferguson v. Bell's Adm'r*, 17 Mo. 347. An offer to give a confirmatory deed on payment of the balance of the purchase money is not an affirmance. *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906.

¹⁴¹ Co. Litt. 2b; *Cecil v. Salisbury*, 2 Vern. 225; *Henry v. Root*, 33 N. Y. 526; *Hubbard v. Cummings*, 1 Me. 11; *Robbins v. Eaton*, 10 N. H. 561; *Cheshire v. Barrett*, 4 McCord (S. C.) 241; *Ellis v. Alford*, 64 Miss. 8, 1 South. 155; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538.

¹⁴² *Uecker v. Koehn*, 21 Neb. 559, 32 N. W. 583; *Hubbard v. Cummings*, 1 Me. 11; *Young v. McKee*, 13 Mich. 552; *Lynde v. Budd*, 2 Paige (N. Y.) 191.

¹⁴³ *Robbins v. Eaton*, 10 N. H. 561; *Hubbard v. Cummings*, 1 Me. 11. When an infant took a deed of land, and gave back a purchase-money mortgage, which was subsequently foreclosed, by bringing ejectment against the purchaser, she was held to have confirmed the mortgage. *Kennedy v. Baker*, 159 Pa. St. 146, 28 Atl. 252; *Bigelow v. Kinney*, 3 Vt. 353.

¹⁴⁴ *Dana v. Coombs*, 6 Me. 89; *Heath v. West*, 8 Fost. (N. H.) 101. When the conveyance and mortgage are not one transaction, then it is no such ratification. *Robbins v. Eaton*, 10 N. H. 561.

makes a mortgage, and after majority conveys the land, stating that the conveyance is made subject to the mortgage, this recital is a confirmation of the mortgage.¹⁴⁵

Mere failure of an infant, on attaining his majority, to disaffirm a partnership agreement entered into during his minority, without any acts as a partner, will not constitute a ratification of contracts entered into by the firm; but a failure to disaffirm, followed by acts as a partner, may. The cases are at variance as to what acts will amount to such a ratification. It has been held that transaction of the firm business after majority, payment of firm debts, and participation in the profits, is not sufficient;¹⁴⁶ but there are cases to the contrary.¹⁴⁷

The acts relied upon as constituting a ratification must be unequivocal, and must reasonably lead to the inference that there was an intention to adopt and be bound by the contract. Unless they show such an intention, ratification cannot be implied.¹⁴⁸ Thus, where an infant becomes a member of a firm, his remaining in the firm after becoming of age, and sharing in the profits, is not a ratification of debts contracted by the firm during his minority, of which he is ignorant,¹⁴⁹ or which he thinks have been paid.¹⁵⁰

A new promise to a stranger is not sufficient to constitute a ratification; it must be made to the other party or to his agent.¹⁵¹ If the promise is conditional, as in the case of a promise to pay when

¹⁴⁵ *Boston Bank v. Chamberlin*, 15 Mass. 220; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Losey v. Bond*, 94 Ind. 67; *Allen v. Poole*, 54 Miss. 323. A recital in a mortgage made after majority, that the property is subject to a prior mortgage, is a ratification of such prior mortgage. *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933.

¹⁴⁶ *Minock v. Shortridge*, 21 Mich. 304; *Martin v. Tobin*, 123 Mass. 85.

¹⁴⁷ *Miller v. Sims*, 2 Hill (S. C.) 479; *Salinas v. Bennett*, 33 S. C. 285.

¹⁴⁸ *Todd v. Clapp*, 118 Mass. 495; *Tobey v. Wood*, 123 Mass. 88; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891; *Crabtree v. May*, 1 B. Mon. (Ky.) 289; *Martin v. Tobin*, 123 Mass. 85.

¹⁴⁹ *Crabtree v. May*, *supra*.

¹⁵⁰ *Tobey v. Wood*, *supra*.

¹⁵¹ *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479.

able, no action can be maintained without showing performance or happening of the condition.¹⁵²

In an early English case it was said, in effect, that a person will not be bound by a ratification of his contract made during infancy, unless he knows that he is not liable in law.¹⁵³ This proposition was mere dictum,¹⁵⁴ but it has frequently been approved, and there are many decisions supporting it.¹⁵⁵ There are some cases, however, which hold that such knowledge on the part of the infant is not necessary, on the ground that ignorance of law cannot avail.¹⁵⁶ In the absence of evidence to the contrary, the late infant will be presumed to have had knowledge of his legal rights.¹⁵⁷

SAME—WHAT CONSTITUTES DISAFFIRMANCE.

205. A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract, and shows an intention to repudiate it.

Disaffirmance of a contract, like ratification, may be implied, and it will generally be implied from any conduct that is clearly inconsistent with the existence of the contract.¹⁵⁸ Where, for in-

¹⁵² *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Thompson v. Lay*, 4 Pick. (Mass.) 48; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245.

¹⁵³ *Harmer v. Killing*, 5 Esp. 102.

¹⁵⁴ *Morse v. Wheeler*, 4 Allen, 570.

¹⁵⁵ *Hinely v. Margaritz*, 3 Pa. St. 428; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 205; *Trader v. Lowe*, 45 Md. 1; *Davidson v. Young*, 38 Ill. 145; *Turner v. Gaither*, 83 N. C. 357; *Thing v. Libbey*, 16 Me. 55; *Burdett v. Williams*, 30 Fed. 697; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Norris v. Vance*, 3 Rich. Law (S. C.) 164; *Petty v. Roberts*, 7 Bush (Ky.) 410; *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Owen v. Long*, 112 Mass. 403. But see *Morse v. Wheeler*, 4 Allen (Mass.) 570. A confirmatory deed given after majority, in ignorance of legal rights, has been set aside in equity. *Wilson v. Insurance Co.*, 60 Md. 150.

¹⁵⁶ *Anderson v. Soward*, 40 Ohio St. 325; *Clark v. Van Court*, 100 Ind. 113; *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 South. 399; *Ring v. Jamison*, 66 Mo. 424; *Morse v. Wheeler*, 4 Allen (Mass.) 570.

¹⁵⁷ *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Hatch v. Hatch's Estate*, 60 Vt. 160.

¹⁵⁸ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Vent v. Osgood*, 19 Pick.

stance, a person who has sold or mortgaged land or goods while an infant sells, leases, or mortgages the same to another after attaining his majority, this is a disaffirmance of his contract.¹⁵⁹ An action by a person after becoming of age to recover land or goods

(Mass.) 572; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Dallas v. Hollingsworth*, 3 Ind. 537.

¹⁵⁹ *Tucker v. Moreland*, 10 Pet. 58; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Chapin v. Shafer*, 49 N. Y. 407; *Peterson v. Laik*, 24 Mo. 541; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; *Pitcher v. Laycock*, 7 Ind. 398; *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Den v. Stowe*, 2 Dev. & B. (N. C.) 323; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538. In some jurisdictions a person is not allowed to convey land which is in the adverse possession of another. Here, therefore, an infant cannot avoid his deed of land by a second deed, executed while his first grantee or another is in the adverse possession of the land. He must first make an entry. *Harrison v. Adcock*, 8 Ga. 68. See *Bool v. Mix*, 17 Wend. (N. Y.) 133. Where an infant mortgages land, and, after obtaining his majority, conveys the land by warranty deed, without excepting the mortgage, the deed is a disaffirmance of the mortgage. *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323. When the deed executed after the infant is of age is of such a nature that it is not inconsistent with the prior conveyance, there is no disaffirmance. *Leitensdorfer v. Hempstead*, 18 Mo. 269; *McGan v. Marshall*, *supra*; *Eagle Fire Co. v. Lent*, 6 Paige, Ch. (N. Y.) 635. Thus, a quitclaim deed has been held not to amount to a disaffirmance of a prior mortgage. *Singer Manuf'g Co. v. Lamb*, 81 Mo. 221. And see *Palmer v. Miller*, 25 Barb. (N. Y.) 399. But see *Bagley v. Fletcher*, 44 Ark. 153, where a quitclaim deed was held a disaffirmance of a prior deed. At one time disaffirmance of a deed of land was required to be by some act of as high and solemn a nature as the deed, and the doctrine has been recognized by the supreme court of the United States, and by some of the state courts. *Pars. Cont.* 323; *Irvine v. Irvine*, 9 Wall. 617; *Tucker v. Moreland*, 10 Pet. 58. By the weight of authority, this solemnity is no longer to be regarded as necessary; but it is held that a deed may be effectually avoided or disaffirmed by any acts or declarations disclosing an unequivocal intent to repudiate it. *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539 (collecting the cases); *Singer Manuf'g Co. v. Lamb*, *supra*; *Tunison v. Chamblin*, 88 Ill. 378. Re-entry with notice of intention to disaffirm, and also a written notice of disaffirmance, have been held sufficient. *Green v. Green*, 69 N. Y. 553; *Scranton v. Stewart*, 52 Ind. 68.

sold by him during his minority is a disaffirmance of the sale;¹⁶⁰ and a contract is disaffirmed by merely pleading infancy when suit is brought to enforce it.

SAME—EXTENT OF RATIFICATION OR DISAFFIRMANCE.

206. The ratification or disaffirmance must be in toto. The contract cannot be ratified or disaffirmed in part only.

The disaffirmance or ratification must go to the whole contract. An infant cannot ratify a part which he deems for his benefit, and repudiate the rest.¹⁶¹ He cannot, for instance, ratify a lease to himself, and avoid a covenant in it to pay rent; nor can he hold lands conveyed to him in exchange, and avoid the transfer of those with which he parted;¹⁶² nor can he hold land conveyed to him, and repudiate a mortgage given at the time as part of the same transaction to secure the purchase money.¹⁶³

¹⁶⁰ *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906; *Philips v. Green*, 3 A. K. Marsh. (Ky.) 7; *Stotts v. Leonard*, 40 Mo. App. 336; *Scott v. Buchanan*, 11 Humph. (Tenn.) 469; *Hughes v. Watson*, 10 Ohio, 134. Where, however, the action is based on the assumption that defendant is wrongfully in possession, as in the case of ejectment, the weight of authority seems to require that there shall have been some previous act of disaffirmance on the part of the infant, for until disaffirmance the defendant is rightfully in possession. See *Law v. Long*, 41 Ind. 583; *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897; *Boal v. Mix*, 17 Wend. (N. Y.) 135; *Clawson v. Doe*, 5 Blackf. (Ind.) 300; *Wallace's Lessee v. Lewis*, 4 Har. (Del.) 75.

¹⁶¹ *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Vt. 353; *Lowry v. Drake's Heirs*, 1 Dana (Ky.) 46.

¹⁶² *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538.

¹⁶³ *Hubbard v. Cummings*, 1 Me. 11; *Uecker v. Koehn*, 21 Neb. 559, 32 N. W. 583; *Bigelow v. Kinney*, 3 Vt. 353; *Heath v. West*, 28 N. H. 108; *Young v. McKee*, 13 Mich. 556; *Skinner v. Maxwell*, 66 N. C. 45; *Cogley v. Cushman*, 16 Minn. 402 (Gil. 354); *Callis v. Day*, 38 Wis. 643.

SAME—RETURN OF CONSIDERATION.

207. An infant may disaffirm his executory contract without first returning the consideration received by him; but, after disaffirmance, he must return the consideration, if he has it.

208. As a rule, if the contract has been executed by him, he cannot avoid it, and recover what he has paid, or for what he has done, without returning the consideration, if he has it. But it is otherwise, by the weight of authority, if he has squandered or otherwise disposed of the consideration during his minority. However—

EXCEPTIONS—(a) Though he has the consideration, he may effectually disaffirm his executed contract, without first returning it, if he does not seek relief from the courts, as, for instance, where he disaffirms his conveyance of land by conveying to another.

(b) Some courts hold that an infant cannot recover what he has paid, or for what he has done, under a contract by which he has received a substantial benefit, unless he can and does place the other party in statu quo. This probably does not apply to his conveyances of land.

Since a person cannot disaffirm in part only a contract made by him during infancy, but must disaffirm in toto, if at all, it is a general rule that, on disaffirming a contract, the party must return the consideration which he has received.¹⁶⁴ Whether or not he must do so as a condition precedent to disaffirmance, or whether the other party must be left to his action to recover the considera-

¹⁶⁴ *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Vt. 353; *Wilhelm v. Hardman*, 13 Md. 140; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 829; *Combs v. Hawes* (Cal.) 8 Pac. 597; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Bartlett v. Cowles*, 15 Gray (Mass.) 446.

tion after disaffirmance, and whether or not the consideration or an equivalent must be returned where it has been wasted or otherwise disposed of, are questions upon which the decisions are conflicting.

As has already been seen, if a person who, during his minority, has received the consideration for his contract, has the consideration in kind when he attains his majority, and afterwards disposes of it, either by consuming it himself, or by selling it, or otherwise putting it beyond his control, or if he retains it for an unreasonable time without seeking to avoid the contract, he thereby ratifies the contract; and this applies whether the contract is executed or executory on his part.¹⁶⁵

Where the contract is executory on the part of the infant, and he has not ratified it by his conduct, it cannot, according to the weight of authority, be enforced against him, even though he has the consideration received by him in kind. He need not return the consideration as a condition precedent to repudiating the contract, and pleading his infancy in an action brought against him to enforce it.¹⁶⁶ When he repudiates the contract, however, he no longer has any right to the consideration he has received; and, if he still has it, the other party may maintain an action to recover it.¹⁶⁷ By the weight of authority, if he has wasted or otherwise disposed of the consideration during his minority, so that he cannot return it in kind, he cannot be held liable for it. The other party is remediless.¹⁶⁸ It must be borne in mind in this connection that retaining the consideration may amount to ratification.

When the contract is executed on the part of the infant, and he has the consideration received by him in kind, it is the almost

¹⁶⁵ Ante, p. 384. Of course, if through no fault on his part, nor conduct amounting to a ratification, consideration which is possessed in kind on attaining his majority subsequently becomes incapable of return, he will occupy the same position as if this state of things existed when he attained his majority.

¹⁶⁶ *Craighead v. Wells*, 21 Mo. 409; *Price v. Furman*, 27 Vt. 268; *Johnson v. Insurance Co.*, 56 Minn. 365, 59 N. W. 992.

¹⁶⁷ *Badger v. Phinney*, 15 Mass. 359; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329.

¹⁶⁸ See *Brawner v. Franklin*, 4 Gill (Md.) 470; *Boody v. McKenney*, 23 Me. 517, 525; post, p. 393.

universal rule that he cannot repudiate the contract, and recover what he has parted with, or for what he has done, unless he returns, or offers to return, the consideration.¹⁶⁹ Some cases go to the extent of saying without qualification that the return of the consideration in such a case is not a condition precedent to the right to disaffirm. This is so where the disaffirmance by the infant is by dealing with the property he has parted with as his own, and where he is not seeking the aid of a court to recover it; as where, having sold land and received the purchase money, he disaffirms by conveying the land to another. The latter deed is effectual though he has not returned the consideration for his prior deed.¹⁷⁰ But an infant cannot maintain an action to recover what he has parted with, or for what he has done, without returning the consideration, if he has it.

According to the weight of authority, an infant, on attaining his majority, may disaffirm his contract, whether it is executory or executed, and in the latter case may recover back what he has parted with, or for what he has done, without returning, or offering to return, the consideration received by him, if, during his minority, he has squandered or otherwise disposed of it, so that he cannot return it.¹⁷¹ He is not bound to return an equivalent. Some of

¹⁶⁹ *Price v. Furman*, 27 Vt. 268; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Dickerson v. Gordon*, 52 Hun, 614, 5 N. Y. Supp. 310; *Harvey v. Briggs*, 68 Miss. 60, 8 South. 274; *Chandler v. Simmons*, 97 Mass. 508; *Carr v. Clough*, 26 N. H. 280; *Robinson v. Weeks*, 56 Me. 102; *Johnson v. Insurance Co.*, 56 Minn. 365, 59 N. W. 992; *Towle v. Dresser*, 73 Me. 252.

¹⁷⁰ *Chandler v. Simmons*, 97 Mass. 508; *Tucker v. Moreland*, 10 Pet. 57, 73; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309; *McCarty v. Iron Co.*, 92 Ala. 463, 8 South. 417.

¹⁷¹ *Gibson v. Soper*, 6 Gray (Mass.) 282; *Chandler v. Simmons*, 97 Mass. 508; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577; *Price v. Furman*, 27 Vt. 268; *Boody v. McKenney*, 23 Me. 517; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Reynolds v. McCurry*, 100 Ill. 356; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329; *Walsh v. Young*, 110 Mass. 399; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Miller v. Smith*, 26 Minn. 218, 2 N. W. 912; *Green v. Green*, 69 N. Y. 553; *Mordecai v. Pearl*, 63 Hun, 553, 18 N. Y. Supp. 513; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Brawner v. Franklin*, 4 Gill (Md.) 463; *Brandon v. Brown*, 106 Ill. 519; *Craig v. Van Beber*, 100 Mo. 584, 13 S. W. 906; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Harvey v. Briggs*, 68 Miss.

the courts extend this rule to cases in which the infant was even benefited by disposing of the consideration.¹⁷² The principle on which this rule is based is that the privilege of the infant to avoid his contracts is intended to protect him against the improvidence which is incident to his immaturity, and that to require him to return the consideration received and squandered or otherwise disposed of during his minority would be to withdraw this protection, and frustrate the object of the law. This rule has been applied, not only where the contract was a sale and conveyance of land by the infant, but to sales of personalty and other contracts as well.

Many courts, on the other hand, applying the principle that the privilege of an infant is intended as a shield, and not as a sword,—or, in other words, as a protection to the infant, and not as an instrument of fraud and injustice to others,—hold that an infant cannot avoid his executed contracts, whereby he has benefited, and recover what he has parted with, or for what he has done, unless

60, 8 South. 274; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852; *Manning v. Johnson*, 26 Ala. 446. It was said in *Price v. Furman*, 27 Vt. 268: "A distinction is to be observed between the case of an infant in possession of such property after age, and when he has lost, sold, or destroyed the property during his minority. In the former case, if he has put the property out of his power, he has ratified the contract, and rendered it obligatory upon him. In the latter case the property is to be restored if it be in his possession and control. If the property is not in his hands, nor under his control, that obligation ceases. To say that an infant cannot recover back his property which he has parted with under such circumstances, because, by his indiscretion, he has spent, consumed, or injured that which he received, would be making his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him."

¹⁷² It has been held in a late Massachusetts case that a minor who contracts with his employer that the price of articles, not necessities, purchased by him from his employer, shall be deducted from his wages, may, on becoming of age, repudiate his contract, and recover his wages without deduction; and this, even though he may have disposed of the articles to his benefit. *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577. And see *Genereux v. Sibley* (R. I.) 25 Atl. 345. It has been held that, where an infant pays the premiums on life insurance, he may disaffirm the contract on becoming of age, return the policy, and recover what he has paid. *Johnson v. Insurance Co.*, 56 Minn. 365, 57 N. W. 934, and 59 N. W. 992.

he can and does restore the consideration he has received; and that it is immaterial that the consideration has been disposed of by him, or for any other reason cannot be returned. In other words, they hold that an infant who receives a substantial consideration for his executed contract cannot, on attaining his majority, avoid the contract, and recover what he has parted with, unless he can and does place the other party in statu quo.¹⁷³

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SAME—EFFECT OF RATIFICATION AND DISAFFIRMANCE.

209. Ratification renders the contract absolutely binding ab initio.

210. Disaffirmance renders the contract absolutely void ab initio. Third parties, therefore, can acquire no rights under an avoided contract.

The effect of ratification is to render the contract binding ab initio.¹⁷⁴ The new promise is not a new contract, but simply a

¹⁷³ Holmes v. Blogg, 8 Taunt. 508 (but see Corpe v. Overton, 10 Bing. 252; Ex parte Taylor, 8 De Gex, M. & G. 254; Valentini v. Canali, 24 Q. B. Div. 166; Adams v. Beall, 67 Md. 53, 8 Atl. 664; Breed v. Judd, 1 Gray (Mass.) 455; Wilhelm v. Hardman, 13 Md. 140; Taft v. Pike, 14 Vt. 405; Heath v. Stevens, 48 N. H. 251; Womack v. Womack, 8 Tex. 397, 417; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Locke v. Smith, 41 N. H. 346; Johnson v. Insurance Co. (Minn.) 59 N. W. 992. When the infant has been paid in money, it has been held that the tender or repayment of the money is not a condition precedent to the right to rescind, but that it can be allowed towards the infant's claim. Heath v. Stevens, 48 N. H. 251; Sparman v. Keim, 83 N. Y. 245. In Johnson v. Insurance Co., supra, the court says: "But if the contract was free from any fraud or bad faith, and otherwise reasonable, excepting that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received." See, also, Medbury v. Watrous, 7 Hill (N. Y.) 110, 115; Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237.

¹⁷⁴ Ward v. Anderson, 111 N. C. 115, 15 S. E. 933; Palmer v. Miller, 25 Barb. (N. Y.) 399; Minock v. Shortridge, 21 Mich. 316; Hall v. Jones, 21 Md. 439. But where an infant gave a deed, and, after majority, ratified it, and gave a second deed to one not having notice of the ratification, the second vendee was held to have good title. "While it is true that the title, after ratification, is held, for most purposes, to relate back to the original deed,

ratification of the original contract; and a suit, if brought, must be on the original contract, and not on the new promise. The ratification renders the contract absolutely binding. It cannot be retracted, and the contract disaffirmed.¹⁷⁵

A voidable contract, if executed by the infant, vests the other party with an interest subject to be defeated by the infant's election to rescind. A sale and conveyance of land, for instance, or a sale and delivery of chattels, vest the purchaser with a defeasible title, subject to being defeated or confirmed by the infant. The purchaser may therefore deal with the property, until disaffirmance, by sale or otherwise, and it is important to ascertain the effect which a disaffirmance will have. It is well settled that disaffirmance of a contract relates back to the date of the contract, and renders it void on both sides *ab initio*;¹⁷⁶ and it follows that the rights of the parties must be determined just as if there never had been any contract between them. One, therefore, who has occupied land under a conveyance by an infant, which is avoided by him on attaining his majority, is liable for use and occupation during the time of his occupation, just as he would be if there had been no conveyance.¹⁷⁷ If the infant's vendee has sold the land to some third person, the latter occupies no better position than the vendee, and the property may be recovered from him, even

yet it is the ratification which is the effective act, and which rescues the deed from its liability, at any moment, to be made a nullity. We have no doubt that, if the ratification is by means of a written instrument, it is within the policy of the registry laws. It is the object of those laws to disclose to all the world the exact condition of a title, and written instruments relating to land not appearing there are to be taken as not existing, unless the knowledge of them is brought home in some other way. If the ratification is by acts in pais, then a subsequent purchaser must be affected with notice of those acts." *Black v. Hills*, 36 Ill. 376.

¹⁷⁵ *Hastings v. Dollarhide*, 24 Cal. 195. See *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541.

¹⁷⁶ *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329; *French v. McAndrew*, 61 Miss. 187; *Boyden v. Boyden*, 9 Mete. (Mass.) 519; *Badger v. Phinney*, 15 Mass. 359; *Hoyt v. Wilkinson*, 57 Vt. 404; *Mette v. Feltgen* (Ill. Sup.) 27 N. E. 911; *Id.*, 148 Ill. 357, 36 N. E. 81; *Derocher v. Mills*, 58 Me. 217; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Lufkin v. Mayall*, 25 N. H. 82.

¹⁷⁷ *French v. McAndrew*, 61 Miss. 187.

though he was a purchaser for value, and without notice of the defeasible nature of the title.¹⁷⁸

Since an infant has this absolute right to avoid his conveyances, the disaffirmance will inure to the benefit of any person who may stand in the infant's shoes by virtue of a subsequent conveyance of the land. Thus, where a person, who has conveyed his land during his minority, executes a conveyance to another person on attaining his majority, the first grantee cannot escape the effect of this disaffirmance by showing that the second grantee knew of the first conveyance when he took his. As was said by the Illinois court: "It can in no just sense be said that the grantee of a person who had conveyed during his infancy is not to be deemed an innocent purchaser, if he has notice of the first deed. He has as perfect a legal right to purchase land which his grantor had sold during minority as he would have to purchase land that had never been conveyed at all. The moment the second deed is made, the deed made in infancy is disaffirmed, and becomes void. It is as if it had never been. This right of disaffirmance is necessarily given by the law to prevent great frauds. Yet the right would be practically of little value to the minor if the person buying of him after he becomes of age is to be considered as incurring, in any way, the censure of the law, and to be therefore denied the position of an innocent purchaser."¹⁷⁹

A conveyance by an infant may be avoided, not only as against the grantee, but also as against bona fide purchasers for value from him. In like manner, personal property disposed of by an infant may be followed into the hands of bona fide purchasers.¹⁸⁰ And negotiable instruments executed by an infant may be avoided in the hands of bona fide holders for value.

Where services have been rendered by an infant under a voidable contract, and he has received nothing under it, he may, on disaffirming the contract, recover the value of the services as on

¹⁷⁸ Hill v. Anderson, 5 Smedes & M. (Miss.) 216; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372; Downing v. Stone, 47 Mo. App. 144; Miles v. Lingerman, 24 Ind. 385.

¹⁷⁹ Black v. Hills, 36 Ill. 376.

¹⁸⁰ Downing v. Stone, 47 Mo. App. 144; Hill v. Anderson, 5 Smedes & M. (Miss.) 216.

an implied contract.¹⁸¹ And in such a case he may, according to the better opinion, recover without any deduction for damages caused by his failure to carry out the contract, for to allow such a deduction would be, in effect, to enforce the contract.¹⁸² So, also, if an infant has paid money or parted with property under a voidable contract, and has himself received nothing, he may recover what he has parted with on avoiding the contract.¹⁸³ Even where he has received something under the contract, he may return it, and recover what he has parted with; and, as has been seen, according to the weight of authority, he may so recover without returning what he has received, if he has lost, wasted, or used it during his minority, so that he cannot return it. A disaffirmance cannot be retracted. A ratification after a disaffirmance comes too late.¹⁸⁴

CAPACITY TO HOLD OFFICE.

211. An infant can hold an office which is purely ministerial, but not one requiring the exercise of discretion, or involving financial responsibility.

An infant may hold an office which is purely ministerial, but when an office requires the exercise of discretion, or the safe dis-

¹⁸¹ *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Gaffney v. Hayden*, 110 Mass. 137; *Price v. Furman*, 27 Vt. 268; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Judkins v. Walker*, 17 Me. 38; *Derocher v. Continental Mills*, 58 Me. 217; *Lufkin v. Mayall*, 25 N. H. 82. See *Clark*, *Cont.* 259.

¹⁸² *Derocher v. Continental Mills*, 58 Me. 217; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375. But see *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Thomas v. Dike*, 11 Vt. 273. But the master may show any facts which affect the value of the infant's services, such as lack of skill, or negligence or disobedience of orders, or injury resulting therefrom, *Vehue v. Pinkham*, 60 Me. 142; and will be credited with payments made under the contract, *Hagerty v. Lock Co.*, 62 N. H. 576; or with the value of necessities furnished the infant, *Meredith v. Crawford*, 34 Ind. 399.

¹⁸³ *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Corpe v. Overton*, 10 Bing. 252; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Shurtleff v. Millard*, 12 R. I. 272.

¹⁸⁴ *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 South. 417.

charge of its duties involves the assumption of liabilities which would not be binding on an infant, he cannot, as a rule, be appointed.¹⁸⁵ He cannot hold a public office requiring the receipt and disbursement of moneys,¹⁸⁶ nor can he act as administrator.¹⁸⁷ A court will not appoint an infant a trustee, since he would not be liable for a breach of trust, and could not give a bond for the security of the funds, and would be wanting in discretion and judgment to properly execute the trust.¹⁸⁸ If an infant is appointed, the court will substitute some one in his place,¹⁸⁹ but without prejudice to his restoration on majority.¹⁹⁰

CAPACITY TO MAKE WILL.

212. At common law the will of a male at 14, and of a female at 12, years of age, was valid as to personalty, but an infant could not make a valid will of real estate.

At common law, males at 14 years of age, and females at 12, could dispose of personal property by will,¹⁹¹ but neither could make a valid devise of real estate until attaining majority.¹⁹² By statute,¹⁹³ in England, no will made by any person under 21 is valid; and the age at which a will can be made in this country is now generally fixed by statutes, some of which are similar to the English statute. Some of the statutes make a distinction between males and females, and some make a distinction between real and personal property.

¹⁸⁵ *Crosbie v. Hurley*, Alc. & N. 431; *Moore v. Graves*, 3 N. H. 408 (collecting cases).

¹⁸⁶ *Claridge v. Evelyn*, 5 Barn. & Ald. 81.

¹⁸⁷ 1 *Williams*, Ex'rs, 479; *Ex parte Sergison*, 4 Ves. 147; *In re Goods of Duchess of Orleans*, 1 Swab. & T. 253; *Rea v. Englesing*, 56 Miss. 463; *Briscoe v. Tarkington*, 5 La. Ann. 692.

¹⁸⁸ *Lewin*, Trusts, 37, 38.

¹⁸⁹ *In re Porter*, 25 Law J. Ch. 482.

¹⁹⁰ *In re Shelmerdine*, 33 Law J. Ch. 474.

¹⁹¹ 1 *Williams*, Ex'rs, 15; *Davis v. Baugh*, 1 Sneed (Tenn.) 477. The question is not free from doubt. Co. Litt. 89b.

¹⁹² *Jarm. Wills*, 32; 4 *Kent*, Comm. 505.

¹⁹³ 1 *Vict. c. 26*, § 7.

INFANTS AS WITNESSES.

213. An infant is competent to testify as a witness if he understands the nature of an oath, but not otherwise.

At common law there is no age under which an infant is incompetent to testify as a witness. The only rule is that he must be of sufficient intelligence to understand the nature of an oath, and the solemn responsibility which rests upon him to tell the truth. Above the age of 14 years an infant is presumed to be competent, though, of course, the presumption may be rebutted by showing that he does not understand the nature of an oath. If he is under 14 years of age he is presumed to be incompetent, and his competency must be established to the satisfaction of the court before he can be allowed to testify.¹⁹⁴ A child of 6 years has been allowed to testify. Though there is some authority to the contrary,¹⁹⁵ by the weight of opinion, when a child, on being examined as to his competency, does not appear to understand the nature of an oath, and is of sufficient intelligence to understand if properly instructed, the trial or proceeding may, in the discretion of the judge, be postponed to allow such instruction.¹⁹⁶ As a rule, the question of an infant's competency as a witness is addressed to the sound discretion of the trial court, and its ruling will not be interfered with, or cause a reversal of the judgment based on the infant's testimony, except in a clear case.¹⁹⁷ But the ruling is reviewable, and will be ground for a reversal if it appears that the child was manifestly ignorant of all religious sanction.¹⁹⁸

¹⁹⁴ 1 Greenl. Ev. § 367; Rosc. Cr. Ev. 94; Reg. v. Hill, 5 Cox, Cr. Cas. 259; State v. Richie, 28 La. Ann. 327; Kendall v. May, 10 Allen (Mass.) 64; Carter v. State, 63 Ala. 52; McGuire v. People, 44 Mich. 286, 6 N. W. 669.

¹⁹⁵ Rex v. Williams, 7 Car. & P. 320; Reg. v. Nicholas, 2 Car. & K. 246.

¹⁹⁶ Com. v. Lynes, 142 Mass. 577, 8 N. E. 408.

¹⁹⁷ McGuire v. People, 44 Mich. 286, 6 N. W. 669.

¹⁹⁸ Rader v. Adamson, 37 W. Va. 585; Beason v. State, 72 Ala. 191.

RESPONSIBILITY OF INFANTS FOR CRIME.

214. At common law a child under the age of 7 years is conclusively presumed to be incapable of entertaining a criminal intent, and cannot commit a crime. Between the ages of 7 and 14 the presumption still exists, but may be rebutted. After the age of 14 he is presumed to have sufficient capacity, and must affirmatively show the contrary.
215. At common law a boy under the age of 14 is conclusively presumed physically incapable of committing rape. In some jurisdictions, though the presumption exists, it may be rebutted.

The ground of an infant's general exemption from criminal responsibility for his acts is the want of sufficient mental capacity to entertain the criminal intention which is an essential element of every crime. If a child, when he commits a wrongful act, is under the age of 7 years, not even the clearest evidence—not even his own confession, indeed—will be received on the part of the state to show that he was of a mischievous discretion. Under that age he is absolutely irresponsible.¹⁹⁹ If, however, he has reached the age of 7, the state is permitted to prove that he was of sufficient capacity to entertain a criminal intention. In the absence of such proof, he is not responsible, and the proof, to warrant a conviction, must be clear and convincing.²⁰⁰ It has been held that a convic-

¹⁹⁹ 4 Bl. Comm. 22; 1 Hale, P. C. 26, 27; Clark, Cr. Law, 49; Clark, Cr. Cas. 77; *People v. Townsend*, 3 Hill (N. Y.) 479. The statutes in some few states have raised the age of absolute incapacity to 10 years. *Angelo v. People*, 96 Ill. 209.

²⁰⁰ *Rex v. Owen*, 4 Car. & P. 236; *Angelo v. People*, 96 Ill. 209; *Carr v. State*, 24 Tex. App. 562, 7 S. W. 328; *State v. Barton*, 71 Mo. 288; *Wusnig v. State*, 33 Tex. 651; *State v. Adams*, 76 Mo. 355; *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983. Assault and battery by 12 year old child, *State v. Goin*, 9 Humph. (Tenn.) 175. See, also, *State v. Tice*, 90 Mo. 112, 2 S. W. 269; *State v. Pugh*, 7 Jones (N. C.) 61; *Hill v. State*, 63 Ga. 578. Sale of liquor by child, *Com. v. Mead*, 10 Allen (Mass.) 398.

tion cannot be had on his own mere naked confession,²⁰¹ but there are cases holding the contrary, where the corpus delicti is otherwise proven.²⁰² When a child has reached the age of 14, he is presumed capable of committing crime; and, to escape responsibility, he must affirmatively show want of capacity.²⁰³ In England, a boy of 10 years, who, after killing a little girl, hid her body, was held criminally liable, because the circumstances showed a mischievous discretion;²⁰⁴ and a boy of 8 years was hanged for arson.²⁰⁵ In this country, a boy of 12 has been hanged for murder.²⁰⁶

There are some exceptions to these rules in case of certain crimes of omission, such as negligently permitting felons to escape, failure to repair highways, etc.; infants being held exempt from responsibility in such case until they reach the age of 21 years, on the ground that until then, not having command of their fortune, they are unable to do these acts as required by law.²⁰⁷

At the common law a boy who has not attained the age of 14 years is conclusively presumed not to have sufficient physical capacity to commit the crime of rape.²⁰⁸ Some of the courts in this country, while they recognize the presumption, hold that it is not a conclusive presumption, but one that may be rebutted by proof

²⁰¹ *State v. Aaron*, 4 N. J. Law, 231.

²⁰² *State v. Guild*, 10 N. J. Law, 163. And see *Fost. Crown Law*, 72; *State v. Bostick*, 4 Har. (Del.) 563.

²⁰³ *Irby v. State*, 32 Ga. 496; *Law v. Com.*, 75 Va. 885. His own testimony that he did not know the act was wrong is not enough. *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741.

²⁰⁴ *York's Case*, *Fost. Crown Law*, 70.

²⁰⁵ *Emlyn on 1 Hale*, P. C. 25.

²⁰⁶ *State v. Guild*, 10 N. J. Law, 163. And see *State v. Aaron*, 4 N. J. Law, 231; *Godfrey v. State*, 31 Ala. 323; *Martin v. State*, 90 Ala. 602, 8 South. 858.

²⁰⁷ 4 Bl. Comm. 22. A minor who has not been emancipated or is not possessed of property cannot be held criminally liable for failure to support his wife. *People v. Todd*, 61 Mich. 234, 28 N. W. 79. Nor can a minor be convicted of selling mortgaged goods, as he has a right to disaffirm the mortgage, and in effect does so by the sale. *Jones v. State*, 31 Tex. Cr. R. 232, 20 S. W. 578. But he may be held liable in bastardy proceedings. *Chandler v. Com.*, 4 Metc. (Ky.) 66.

²⁰⁸ *Clark*, Cont. 191; *Reg. v. Phillips*, 8 Car. & P. 736; *Com. v. Green*, 2 Pick. (Mass.) 380; *McKinny v. State*, 29 Fla. 565, 10 South. 732.

of capacity.²⁰⁹ A boy under the age of 14 may be guilty as principal in the second degree or accessory to the crime committed by another, if of sufficient mental capacity to be responsible for his crimes, though lacking in physical capacity to commit the crime himself.²¹⁰

ACTIONS IN TORT BY INFANTS.

216. An infant has the same right as an adult to sue for tortious injuries. Such actions are governed by the ordinary rules of law, and, if the infant fails to exercise due care, his contributory negligence may bar his right of recovery.

217. The due care required by law, being due care under the circumstances of the case—

(a) A less degree of care will ordinarily be required of an infant than of an adult, and accordingly—

(1) An infant too young to be capable of exercising due care is held, as a matter of law, incapable of contributory negligence.

EXCEPTION—In some jurisdictions the negligence of the parent or guardian will be imputed to the child.

(2) In general, only such care will be required of an infant as is due care in one of his years and experience.

(b) A greater degree of care is required of an adult in dealing with an infant than with an adult.

(c) An adult who places a dangerous agency, which, from its nature, is attractive to children, where it is accessible to them, may be liable for injuries caused thereby, though the children are trespassers.

²⁰⁹ *Williams v. State*, 14 Ohio, 222; *People v. Randolph*, 2 Parker, Cr. R. (N. Y.) 174; *Heilman v. Com.*, 84 Ky. 457, 1 S. W. 731; *Wagoner v. State*, 5 Lea (Tenn.) 352; *State v. Jones*, 39 La. Ann. 935, 3 South. 57.

²¹⁰ 1 Hale, P. C. 630; *Law v. Com.*, 75 Va. 885.

In case of an injury to the person of an infant by the tortious act of another, two causes of action may arise,—one, as has been seen, in favor of the parent for loss of services;²¹¹ and one in favor of the infant for the injury to his person. In actions by the infant the ordinary rules of law governing the question of negligence apply, except in so far as they must necessarily be modified to meet the changed conditions arising from the infant's want of discretion and experience. A child of very tender years has been held, as a matter of law, incapable of contributory negligence;²¹² and, in general, a less degree of care is required of an infant than of an adult. The degree required depends on his age and knowledge, and is such as would be ordinary care in one of his years and experience, under the same circumstances.²¹³

On the other hand, an adult will be held to a higher degree of care in dealing with an infant than with one of mature age and understanding.²¹⁴ To the general rule, that one injured while trespassing or guilty of contributory negligence has no right of action for the injury, there is an exception in favor of children in case they are injured by dangerous agencies which are in their nature likely to be tempting to them, and which are left where they are accessible. The theory on which these cases proceed is that the temptation of an attractive plaything to a child is a thing which must be expected and guarded against, and that the placing of such objects where they are accessible to children is an implied invitation to them.²¹⁵ When a child is too young to be capable

²¹¹ Ante, p. 265.

²¹² *Fink v. Furnace Co.*, 10 Mo. App. 61; *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Mangam v. Railroad Co.*, 38 N. Y. 455; *Schmidt v. Railway Co.*, 23 Wis. 186; *Toledo, W. & W. Ry. Co. v. Grable*, 88 Ill. 441; *Morgan v. Bridge Co.*, 5 Dill. 96, Fed. Cas. No. 9,802; *Bay Shore R. Co. v. Harris*, 67 Ala. 6.

²¹³ *Railroad Co. v. Stout*, 17 Wall. 657; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619; *Byrne v. Railroad Co.*, 83 N. Y. 620; *Lynch v. Smith*, 104 Mass. 52; *Dowling v. Allen*, 88 Mo. 203; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Evansich v. Railway Co.*, 57 Tex. 126; *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623; *Lynch v. Nurdin*, 1 Q. B. 29.

²¹⁴ *Carter v. Towne*, 98 Mass. 567; *Binford v. Johnston*, 82 Ind. 426; *Branson v. Labrot*, 81 Ky. 638.

²¹⁵ An owner has been held liable, on this principle, for injury to a child

of exercising care, it is held in some jurisdictions that contributory negligence on the part of his parent or guardian will prevent recovery by the child.²¹⁶ In many jurisdictions, on the other hand, this rule is expressly repudiated.²¹⁷

caused by the caving in of a sandpit, attractive to and frequented by children, *Fink v. Furnace Co.*, 10 Mo. App. 61 (contra, *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965); for leaving dangerous explosives accessible to children, as a single torpedo unguarded on a railway track, *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451; and dynamite in an open shed, near where children were in the habit of playing, *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257. In this case the court said: "If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose that they were at liberty to handle or play with, they should expect that liberty to be taken." On the same principle, railroads have been held liable for injuries caused to children from playing on turntables. *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Railway Co.*, 21 Minn. 211. In the last case the court said: "Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turntable unfastened for the purpose of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defense to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass." See, also, *Nagel v. Railway Co.*, 75 Mo. 653; *Evansich v. Railway Co.*, 57 Tex. 126; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619.

²¹⁶ This doctrine was first laid down in *Hartfield v. Roper*, 21 Wend. 614. Cowen, J., said: "It is perfectly well settled that, if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels, which can scarcely be said of a totpling infant, suffered by his guardians to be there, either as a traveler, or for the purpose of pursuing his sports. The application may be harsh when made to small children. As they are known to have no personal discretion, common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule, when they bring an action for redress, and there is no other way of enforcing it except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deem-

²¹⁷ See note 217 on following page.

LIABILITY OF INFANTS FOR TORTS.

218. An infant must answer for his torts as fully as an adult, and the fact that the tort is committed under authority or command of his parent is no defense.
219. Since an infant is not bound by his contract, except in certain cases, a breach of contract, except in those cases, cannot be treated as a tort, so as to make him liable. The tort must be separate and independent of it.

Infancy is no defense for a tort committed by a minor. He is liable for injuries caused to the person or property of another as fully as is an adult. Thus, an action in tort will lie against an infant

ed that of the infant; his neglect, the infant's neglect." And see *Holly v. Gaslight Co.*, 8 Gray, 123; *Leslie v. Lewiston*, 62 Me. 468; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89; *Schmidt v. Railway Co.*, 23 Wis. 186; *Fitzgerald v. Railway Co.*, 29 Minn. 336, 13 N. W. 168; *Toledo, W. & W. Ry. Co. v. Grable*, 88 Ill. 441; *Meeks v. Railroad Co.*, 52 Cal. 602; *Baltimore & O. R. Co. v. State*, 30 Md. 47. It has been held that, where the poverty of the child's parents prevents them from keeping constant watch over it, their circumstances are proper for the consideration of the jury in determining the question of due care. *O'Flaherty v. Railway Co.*, 45 Mo. 70. In this case it was said: "To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant would be to hold that free air and exercise should be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor." And see *City of Chicago v. Major*, 18 Ill. 349; *Pittsburg, A. & M. Ry. Co. v. Pearson*, 72 Pa. St. 169; *Walters v. Railroad Co.*, 41 Iowa, 71; *Hoppe v. Railway Co.*, 61 Wis. 357, 21 N. W. 227; *Isabel v. Railroad Co.*, 60 Mo. 475.

²¹⁷ *Robinson v. Cone*, 22 Vt. 213. In this case the court said: "Here the jury have found that the plaintiff was properly suffered by his parents to attend school at the age and in the manner he did, and that injury happened through the ordinary neglect of the defendant, or, if not properly suffered to go to school, then that the defendant was guilty of gross neglect; for the judge put the case in the alternative to the jury, and they have found a general verdict for the plaintiff. And we are satisfied that although a child or idiot or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his re-

for an injury caused by his negligence;²¹⁸ for conversion,²¹⁹ trespass,²²⁰ or slander.²²¹ "The law with respect to liability of infants has proceeded rather on the theory of compensating the injured party than of consistently maintaining any logical doctrine as to the mental attitude of the wrongdoer, and of basing the responsibility on the wrongful intention or inadvertence. The cases proceed on the propriety of holding all persons liable for actual damages committed by them, and of ignoring volition as a necessary element of a juridical cause."²²² As was said by Lord Kenyon in a leading English case: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice."²²³ The fact that a tort is committed by an infant under authority or command of his parent may render the parent also liable, but it will not excuse the infant.²²⁴

dress." And see *Daley v. Railroad Co.*, 26 Conn. 591; *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Whirley v. Whiteman*, 1 Head (Tenn.) 610; *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623; *Boland v. Railroad Co.*, 36 Mo. 484.

²¹⁸ *Jag. Torts*, 159, and cases there cited; *Bac. Abr. "Infancy and Age," H*; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Conklin v. Thompson*, 29 Barb. (N. Y.) 218; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Peterson v. Haffner*, 59 Ind. 130; *Conway v. Reed*, 66 Mo. 346; *Huchting v. Engel*, 17 Wis. 230. On the question of negligence, the jury has a right to take into consideration the childhood of the parties. *Harvey v. Dunlop, Hill & D.* 193. In *Bullock v. Babcock*, supra, it was said: "Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults." Where defendants were 13 and 16, it was held that their youth was not to be taken into consideration on the question of negligence. *Neal v. Gillett*, 23 Conn. 437.

²¹⁹ *Jag. Torts*, 159; *Mills v. Graham*, 1 Bos. & P. 140; *Vasse v. Smith*, 6 Cranch, 226; *Walker v. Davis*, 1 Gray (Mass.) 506; *Baxter v. Bush*, 29 Vt. 465; *Fitts v. Hall*, 9 N. H. 441; *Lewis v. Littlefield*, 15 Me. 235.

²²⁰ *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Jag. Torts*, 159.

²²¹ *Defries v. Davis*, 1 Bing. N. C. 692; *Jag. Torts*, 159.

²²² *Jag. Torts*, 159, where the subject is discussed, and numerous cases collected.

²²³ *Jennings v. Rundall*, 8 Term R. 335.

²²⁴ *Scott v. Watson*, 46 Me. 362; *Humphrey v. Douglass*, 10 Vt. 71; *Smith v. Kron*, 96 N. C. 892, 2 S. E. 533; *Wilson v. Garrard*, 59 Ill. 51; *Jag. Torts*, 160.

Infants cannot empower an agent or attorney to act for them, nor, by the weight of authority, affirm what another may have assumed to do on their account; and therefore they are not liable for torts alleged to have been committed by their agent. They cannot be held liable for "torts by prior or subsequent assent, but only for their own act."²²⁵

There are cases in which tenderness of age may be available as a defense. "In certain classes of cases, the inability of very young infants to be intelligent actors, and therefore their inability to judicially cause a wrong, has been recognized. In such cases the wrong is considered due to unavoidable accident."²²⁶ And, where malice is a necessary element, an infant may or may not be liable, according as his age and capacity may justify imputing malice to him, or may preclude the idea of his indulging it."²²⁷

Tort or Contract.

While an infant is liable for his torts, yet if the tort arises from a breach of contract, and is not separate from and independent of the contract, he cannot be deprived of his defense of infancy, by the plaintiff's merely changing the form of action, and suing in tort.²²⁸ If, however, the tort, though in a sense connected with the contract, is not a mere breach of it, but a distinct wrong of itself, the infant is liable.²²⁹ Where an infant hired a horse to ride, and injured it by overriding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence.²³⁰ Where, on the other hand, an infant hired a horse ex-

²²⁵ Jag. Torts, 160; *Burnham v. Seaverns*, 101 Mass. 360; *Cunningham v. Railway Co.*, 77 Ill. 178.

²²⁶ *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; Jag. Torts, 160; *Ames & S. Cas. Torts*, 30; *Whart. Neg.* § 88; note 218, *supra*.

²²⁷ Jag. Torts, 160; *Cooley*, Torts (2d Ed.) 120; *Johnson v. Pye*, 1 Sid. 258.

²²⁸ Jag. Torts, 162; *Clark*, Cont. 260; *Jennings v. Rundall*, 8 Term R. 335; *Eaton v. Hill*, 50 N. H. 235, and cases hereafter cited.

²²⁹ Jag. Torts, 162; *Clark*, Cont. 260; *Burnard v. Haggis*, 14 C. B. (N. S.) 45; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Ray v. Tubbs*, 50 Vt. 688, and cases hereafter cited.

²³⁰ *Jennings v. Rundall*, 8 Term R. 335. The infant cannot be held liable for injuries to the thing bailed caused by his mere lack of skill or experience. *Moore v. Eastman*, 1 Hun (N. Y.) 578; *Eaton v. Hill*, 50 N. H. 235. In the latter case it was said: "When the infant stipulates for ordinary skill

pressly for riding, and not for jumping, and then lent it to a friend who killed it in jumping, he was held liable, because what he had done was not an abuse of the contract, but an act which he was expressly forbidden to do, and was therefore independent of the contract.²³¹ In other words, "if an infant bailee does any willful or positive act, amounting to an election on his part to disaffirm the contract, or to convert the property to his own use, or if he wantonly and intentionally commits a trespass, his infancy is no protection."²³² A good illustration of the application of the principle under consideration is in the case of seduction under a promise of marriage. A promise by an infant to marry is not binding on him, and he could not be sued for the mere breach thereof; but he may, nevertheless, be held liable in an action *ex delicto* for seducing a woman under a promise of marriage.²³³

This question frequently arises in actions against an infant for

and care in the use of the thing bailed, but fails for want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. A failure in such a case, from mere want of ordinary care or skill, might well be regarded as, in substance, a breach of contract, for which the infant is not liable, even although in ordinary cases an action *ex delicto* might be sustained. But when, on the other hand, the infant wholly departs from his character of bailee, and, by some positive act, willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if *assumpsit* might be maintained in the case of an adult, or a promise to return the thing safely."

²³¹ *Burnard v. Haggis*, 14 C. B. (N. S.) 45. The same is true where an infant hires a horse to go to one place, but goes elsewhere, and injures the horse by overdriving. He is liable in *trover* or *trespass*. *Homer v. Thwing*, 3 Pick. (Mass.) 492. And see *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Hall v. Corcoran*, 107 Mass. 251; *Woodman v. Hubbard*, 25 N. H. 73; *Towne v. Wiley*, 23 Vt. 355; *Ray v. Tubbs*, 50 Vt. 688; *Freeman v. Boland*, 14 R. I. 39; *Lewis v. Littlefield*, 15 Me. 233. *Contra*, *Penrose v. Curren*, 3 Rawle (Pa.) 351; *Wilt v. Welsh*, 6 Watts (Pa.) 9. And see *Schenk v. Strong*, 4 N. J. Law, 97. That *trover* will lie for goods converted by an infant, although in his possession by virtue of a contract, see, also, *Vasse v. Smith*, 6 Cranch, 226; *Fitts v. Hall*, 9 N. H. 441; *Mathews v. Cowan*, 59 Ill. 341.

²³² *Jag. Torts*, 162.

²³³ *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361.

fraud in connection with a contract. If the action proceeds on the idea that the contract exists, it cannot be maintained. Thus, an action will not lie against an infant for false warranty in the sale of goods;²³⁴ nor will an action lie for falsely warranting a horse to be sound.²³⁵ It has been held that, if an infant obtains goods by false representations,—and this includes false representations that he is of age,—the other party may avoid the contract on the ground of the fraud; and in such event the property may be considered as never having passed from him, or as having revested in him, and therefore he may maintain replevin to recover the goods, or trover for their conversion.²³⁶ The cases are agreed that at law false representations by an infant that he is of age, inducing the other party to contract with him, do not estop him from pleading his infancy if sued upon the contract.²³⁷ Nor will such false representations estop him from avoiding his contract, and seeking affirmative relief, as to recover property which he has parted with.²³⁸ By the weight of authority, if an infant fraudulently induces another to deal with him by falsely representing that he is of age, and afterwards avoids the contract, the other

²³⁴ Prescott v. Norris, 32 N. H. 101; Doran v. Smith, 49 Vt. 353; Studwell v. Shapter, 54 N. Y. 249.

²³⁵ Gilson v. Spear, 38 Vt. 311; Green v. Greenbank, 2 Marsh. C. P. 485; Howlett v. Haswell, 4 Camp. 118. But see Word v. Vance, 1 Nott & McC. (S. C.) 197.

²³⁶ Badger v. Phinney, 15 Mass. 359; Neff v. Landis, 110 Pa. St. 204, 1 Atl. 177.

²³⁷ Burley v. Russell, 10 N. H. 184; Brown v. McCune, 5 Sandf. (N. Y.) 224; Studwell v. Shapter, 54 N. Y. 249; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695; McKamy v. Cooper, 51 Ga. 679, 8 S. E. 312. And see Sims v. Everhardt, 102 U. S. 300.

²³⁸ Whitcomb v. Joslyn, 51 Vt. 79; Norris v. Vance, 3 Rich. Law (S. C.) 164. His false representation that he is of age will not prevent him from avoiding his contract of service, and from recovering on a quantum meruit. Burdett v. Williams, 30 Fed. 697. Nor will a recital in a deed that he is of age estop him from disaffirming the deed. Wieland v. Kobick, 110 Ill. 16. But see Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877. He may be estopped to disaffirm under such circumstances where he stands by, after majority, knowing that the land is being conveyed to subsequent purchasers. Lacy v. Pixler (Mo. Sup.) 25 S. W. 206; ante, p. 386.

party may maintain an action of deceit against him.²³⁹ There are cases, however, which hold the other way.²⁴⁰

In equity an infant stands in a very different position as to his fraudulent representations; and where he has falsely represented that he is of age, or been guilty of other fraudulent acts, whereby he has entrapped others into selling or purchasing property, or advancing money on it, he will not be heard to plead his infancy to the other's prejudice; and the general tendency of courts of equity is to refuse to recognize the disability of infancy when taken advantage of to commit a fraud.²⁴¹

Where the substance of the action is in tort, it cannot be defeated by the plea of infancy, though it is in form an action *ex contractu*, for, as has been seen, an infant is bound by obligations *quasi ex contractu*, or contracts created by law.²⁴² Thus, if he embezzles or converts money, the party injured may waive the tort, and maintain *assumpsit* for money had and received, and infancy will be no defense.²⁴³

²³⁹ *Fitts v. Hall*, 9 N. H. 441; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Eckstein v. Frank*, 1 Daly (N. Y.) 334.

²⁴⁰ *Johnson v. Pie*, 1 Lev. 169 (approved by Parke, B., in *Price v. Hewett*, 8 Exch. 146); *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47. See *Ferguson v. Bobo*, 54 Miss. 121.

²⁴¹ *Savage v. Foster*, 9 Mod. 35; *Cory v. Gertcken*, 2 Madd. 40; *Ex parte Unity Joint-Stock Mut. Banking Ass'n*, 3 De Gex & J. 63; *Overton v. Banister*, 3 Hare, 503; *Ferguson v. Bobo*, 54 Miss. 121; *Evaus v. Morgan*, 69 Miss. 328, 12 South. 270; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *Schmitzheimer v. Eiseman*, 7 Bush (Ky.) 298. Contra, *Geer v. Hovy*, 1 Root (Conn.) 179. And see *Sims v. Everhardt*, 102 U. S. 300; *Brown v. McCune*, 5 Sandf. (N. Y.) 224. False representations, known by the party to whom they were made to be false, will not estop the infant. *Charles v. Hastedt* (N. J. Ch.) 26 Atl. 564. Mere failure to disclose his age has been held not to estop a minor from avoiding his contract, even in equity. *Baker v. Stone*, 136 Mass. 405; *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. 162; *Davidson v. Young*, 38 Ill. 145; *Price v. Jennings*, 62 Ind. 111; *Thormachlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089. *Ferguson v. Bobo*, *supra*, apparently contra, is distinguished in *Brantley v. Wolf*, 60 Miss. 420.

²⁴² Ante, p. 364.

²⁴³ *Bristow v. Eastman*, 1 Esp. 172; *Elwell v. Martin*, 32 Vt. 217. In the latter case the court says: "As infancy does not protect him from the consequences of his tortious acts, why should it furnish him with a defense when sued *ex contractu*, instead of *ex delictu*? * * * It is not a contract

INFANTS AS PARTIES TO ACTIONS.

220. An infant cannot sue in person or by attorney, but only by guardian or next friend; and, when sued, he cannot appear in person, by attorney or next friend, but only by a general guardian or by guardian ad litem. In most states the appointment of the next friend or guardian ad litem is regulated by statute.
221. Where an infant is sued, and has appeared by guardian ad litem, he is bound by a judgment at law and decree in equity as fully as an adult.

While the rights of infants may be enforced in courts of law, they cannot sue in person, nor are they competent to appoint attorneys to appear in court for them.²⁴⁴ At common law they could only sue by guardian. By the statute of Westm. 2, c. 15, infants were authorized to sue by *prochien ami*, or next friend, and, by well-settled practice, may generally sue either by guardian or by next friend,²⁴⁵ though in many jurisdictions the whole matter is regulated by statute. The next friend or guardian is an officer of the court, rather than a party to the action,²⁴⁶ and, in theory, is appointed

in which he may have been cheated, and against which infancy shields him, but a willful wrong which he has committed against another, and in which the law implies the obligation to make restitution." And see *Shaw v. Coffin*, 58 Me. 254.

²⁴⁴ 1 Co. Litt. 135b; *Bartholomew v. Dighton*, Cro. Eliz. 424; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Wainwright v. Wilkinson*, 62 Md. 146; *Clark v. Turner*, 1 Root (Conn.) 200; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Mockey v. Grey*, 2 Johns. (N. Y.) 192.

²⁴⁵ 1 Bl. Comm. 464; *Deford v. State*, 30 Md. 179; *Barwick v. Rackley*, 45 Ala. 215; *Brown v. Hull*, 16 Vt. 673; *Judson v. Blanchard*, 3 Conn. 579; *Hurt v. Railroad Co.*, 40 Miss. 391; *Simpson v. Alexander*, 6 Cold. (Tenn.) 619.

²⁴⁶ *Davies v. Lockett*, 4 Taunt. 765; *Klaus v. State*, 54 Miss. 644; *Bartlett v. Batts*, 14 Ga. 539; *Baltimore & O. R. Co. v. Fitzpatrick*, 36 Md. 619. And therefore he may be removed by the court at any time for cause. *Barwick v. Rackley*, 45 Ala. 215; *Deford v. State*, 30 Md. 179; *Simpson v. Alexander*, 6 Cold. (Tenn.) 619.

by the court; but in practice, except when required by statute, the obtaining of an order of appointment has fallen into disuse, as it may subsequently be obtained if the authority to appear is questioned.²⁴⁷ His authority begins with the commencement of the action, and he cannot sue when a demand is necessary before suit.²⁴⁸ In the appointment of the next friend, the courts will generally respect the claim of a father, as the natural guardian of his child, to represent the infant,²⁴⁹ unless his interest is adverse,²⁵⁰ but relationship is not a requisite in a next friend.²⁵¹

When an infant is sued, he cannot appear in person or by attorney,²⁵² or by next friend,²⁵³ but only by guardian. If the infant already has a general guardian, it is his duty to appear for the infant,²⁵⁴ unless his interest is adverse; but, if no general guardian has been appointed, a special guardian, known as a "guardian ad litem," must be appointed by the court, to represent the infant in the action.²⁵⁵ The appointment and duties of a guardian ad litem are regulated by statute in most of the states. The failure to appoint a guardian ad litem is, apart from statutory regulations, an error which may be cured within a limited time after appear-

²⁴⁷ *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Judson v. Blanchard*, 3 Conn. 579; *Barwick v. Rackley*, 45 Ala. 215; *Deford v. State*, 30 Md. 179; *Klaus v. State*, 54 Miss. 644; *Rima v. Iron Works*, 120 N. Y. 433, 24 N. E. 940; *Bartlett v. Batts*, 14 Ga. 539. By statute, a formal order of appointment is often required.

²⁴⁸ *Miles v. Boyden*, 3 Pick. (Mass.) 213.

²⁴⁹ *Woolf v. Pemberton*, 6 Ch. Div. 19; *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. 369.

²⁵⁰ *Patterson v. Pullman*, 104 Ill. 80.

²⁵¹ *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Burns v. Willson*, 1 Mo. App. 179; *Bartlett v. Batts*, 14 Ga. 539.

²⁵² *Co. Litt.* 88b, note; *Frescobaldi v. Kinaston*, 2 Strange, 783; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Knapp v. Crosby*, 1 Mass. 479; *Bedell's Heirs v. Lewis' Heirs*, 4 J. J. Marsh. (Ky.) 562; *Starbird v. Moore*, 21 Vt. 529; *Marshall v. Wing*, 50 Me. 62; *Wright v. McNatt*, 49 Tex. 425.

²⁵³ *Fitzh. Nat. Brev.* 27 H; *Bush v. Linthicum*, 59 Md. 344; *Brown v. Hull*, 16 Vt. 673.

²⁵⁴ *Mansur v. Pratt*, 101 Mass. 60; *Cowan v. Anderson*, 7 Cold. (Tenn.) 284; *Colt v. Colt*, 19 Blatchf. 399, 48 Fed. 385; *Hughes v. Sellers*, 34 Ind. 337; *Smith v. McDonald*, 42 Cal. 484.

²⁵⁵ *Bac. Abr.* "Guardian," B 4; *Roberts' Widow v. Stanton*, 2 Munf. (Va.) 129; *Stinson v. Pickering*, 70 Me. 273; *Wells v. Smith*, 44 Miss. 296.

ance;²⁵⁶ but, when no guardian ad litem has been appointed, a judgment rendered under such circumstances is voidable,²⁵⁷ though valid until set aside.²⁵⁸ Likewise, a decree in equity rendered against an infant, after due service of process and appearance by guardian ad litem, is binding on him until reversed, and is only reversible for fraud, collusion, or error.²⁵⁹

²⁵⁶ *Nicholson v. Wilborn*, 13 Ga. 467.

²⁵⁷ *O'Hara v. MacConnell*, 93 U. S. 150; *Austin v. Trustees*, 8 Metc. (Mass.) 196; *Walkenhorst v. Lewis*, 24 Kan. 420; *Moore v. McEwen*, 5 Serg. & R. (Pa.) 373; *Barber v. Graves*, 18 Vt. 290.

²⁵⁸ *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553; *Austin v. Trustees*, 8 Metc. (Mass.) 196; *England v. Garner*, 90 N. C. 197; *Bernecker v. Miller*, 44 Mo. 102; *Walkenhorst v. Lewis*, 24 Kan. 420.

²⁵⁹ 1 *Daniell*, Ch. Prac. 205; *Gregory v. Molesworth*, 3 Atk. 626; *Ralston v. Lahee*, 8 Iowa, 17; *Rivers v. Durr*, 46 Ala. 418.

CHAPTER XV.

PERSONS NON COMPOTES MENTIS AND ALIENS.

- 222-241. Persons Non Compotes Mentis.
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- 237-241. Drunken Persons.
- 237-238. Contracts.
- 239. Liability for Torts.
- 240. Responsibility for Crimes.
- 241. Capacity to Make a Will.
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222. PERSONS NON COMPOTES MENTIS.

Insanity is "a manifestation of disease of the brain, characterized by a general or partial derangement of one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed."¹ The term is used broadly in the law, to denote all kinds of mental alienation, and as synonymous with the phrase "non compos mentis." Coke enumerates four classes of persons who are deemed in law to be insane or non compos mentis, namely: (1) An idiot or fool natural,—that is, a person who has been of unsound mind since his birth; (2) he who was of good and sound mind and memory, but, by the act of God, has lost it; (3) a lunatic, lunaticus, qui gaudet in lucidis intervallis, who sometimes is of good sound mind and memory, and sometimes non compos mentis; and (4) one who is non compos mentis by his own act, as a drunkard.² The last class

¹ Black, Law Dict. tit. "Insanity"; Ham. Nerv. Sys. 332.

² Black, Law Dict. tit. "Non Compos Mentis." Co. Litt. 247a; 4 Coke, 124; Johnson v. Phifer, 6 Neb. 404. "The most common forms in which it [insanity] presents itself are those of mania, monomania, and dementia. All

will be considered separately, for drunkenness is not generally understood as a phase of insanity in law, and in many respects the rules relating to insanity do not apply in the case of drunkenness.

The status of an insane person is peculiar. As he is lacking in mind, he can do no act which requires an intelligent mental operation. In the following sections we shall consider his capacity to contract, his capacity to make a will, his liability for torts, and his responsibility for crime.

these imply a derangement of the faculties of the mind from their normal or natural condition. Idiocy, which is usually classed under the general designation of 'insanity,' is more properly the absence of mind than the derangement of its faculties. It is congenital,—that is, existing in birth,—and consists not in the loss or derangement of the mental powers, but in the destitution of powers never possessed. Mania is that form of insanity where the mental derangement is accompanied with more or less of excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred, and of things which do not exist, and acts more or less in conformity with his belief in these particulars. The mania may be general, and affect all or most of the operations of the mind; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed 'monomania.' Dementia is that form of insanity where the mental derangement is accompanied with a general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. 'In dementia,' says Ray, a celebrated writer on medical jurisprudence, 'the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak, events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat isolated words and phrases without the slightest meaning.'" Per Field, C. J., in *Hall v. Unger*, Fed. Cas. No. 5,949.

GUARDIANSHIP.

223. The guardianship of persons non compotes mentis is provided for by statute in most jurisdictions. Generally the probate or some similar court is given the power to appoint a guardian or committee of the persons and estates of insane persons; and in some states the power is extended to include drunkards or spendthrifts.

224. The guardianship of persons non compotes mentis is governed by substantially the same rules of law as the guardianship of infants.

The crown as *parens patriæ* had authority over the care and custody of infants, but this authority did not originally extend to persons non compotes mentis. It was, however, conferred on the crown by parliament, and intrusted under the sovereign's sign manual to the lord chancellor. In this country the guardianship of persons non compotes mentis is regulated by statute, jurisdiction being generally conferred on the probate or other similar court. Guardianship over spendthrifts was unknown at common law, but is not uncommon under statutes in this country. In some jurisdictions a person to whom the court has intrusted the guardianship of an insane person or spendthrift is called a "guardian," while in others he is called a "committee." The principles and rules of law governing the relation of guardian and insane ward are substantially the same as those which govern the relation of guardian and infant ward. These have already been explained.³ The effect of guardianship on the capacity of the ward to contract and to make a will will be considered in the following sections.⁴

³ Ante, p. 308.

⁴ Post, pp. 418, 432.

CONTRACTS OF INSANE PERSONS.

225. As a general rule, a contract entered into by a person when he is so insane as to be incapable of understanding its nature and effect is voidable at his option. The rule is subject, however, to the following exceptions:

(a) The following contracts are valid and binding:

- (1) Contracts created by law, or quasi contracts.
- (2) Contracts for necessities furnished to himself, or, by the weight of authority, to his wife or children.
- (3) In most, but not all, jurisdictions, where the other party to the contract acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in statu quo.

(b) The following contracts are absolutely void:

- (1) In most, but not all, jurisdictions, contracts by a person who has been judicially declared insane, and placed under guardianship.
- (2) In a few jurisdictions, deeds and powers of attorney or other appointments of an agent.

It was at one time said to be a maxim of the common law that no man of full age should be allowed by plea to stultify himself by pleading insanity, and thereby avoid his deed or contract;⁵ but if this was ever the law, which is very doubtful,⁶ it is so no longer. It is universally held that a contract made by a person who is so lacking in mental capacity from defect or disease of the mind as to be incapable of understanding its nature and effect is, as a general rule, voidable, at least where the other party knew of his

⁵ *Beverley's Case*, 4 Coke, 123b; Co. Litt. 147; 2 Bl. Comm. 292.

⁶ *Fitzh. Nat. Brev.* 202; *Yates v. Boen*, 2 Strange, 1104; *Webster v. Woodford*, 3 Day (Conn.) 90; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431.

condition, and in most cases whether there was such knowledge or not.⁷ The reason is that a contract requires the assent of two minds, and an insane person has no mind, and is therefore incapable of assenting.

It makes no difference what the form of the insanity may be, or what caused it.⁸ It must be something more than mere weakness of intellect,⁹ but it need not be so great as to dethrone reason, or to amount to an entire want of reason.¹⁰ It must be such as to render the person incapable of comprehending the subject of the contract, and its nature and probable consequences.¹¹ If the party is insane at times only, the contract, to be voidable, must have been made while he was insane. If made during a lucid interval, it is binding.¹² Permanent insanity need not be shown. It is enough if insanity existed at the time the contract was made, though the party may have been perfectly sane both before and

⁷ Webster v. Woodford, *supra*; Mitchell v. Kingman, *supra*; Rice v. Peet, 15 Johns. (N. Y.) 503; Morris v. Clay, 8 Jones (N. C.) 216; Burnham v. Mitchell, 34 Wis. 117; Clark, Cont. 264, and cases there cited.

⁸ Idiocy, Burnham v. Kidwell, 113 Ill. 425; Ball v. Mannin, 3 Bligh (N. S.) 1; Ewell, Lead. Cas. 534. Lunacy, Jackson v. Gumaer, 2 Cow. (N. Y.) 552. Senile dementia, Stone v. Wilbern, 83 Ill. 105; Jeneson v. Jeneson, 66 Ill. 259; Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Lynch v. Doran, 95 Mich. 395, 54 N. W. 882; Arnold v. Whitecomb, 83 Mich. 19, 46 N. W. 1029; Keeble v. Cummins, 5 Hayw. (Tenn.) 43; Clark, Cont. 264, 265, and cases there cited.

⁹ Dennett v. Dennett, 44 N. H. 531; Miller v. Craig, 36 Ill. 110; Stone v. Wilbern, 83 Ill. 105; Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Simonton v. Bacon, 49 Miss. 582; Lawrence v. Willis, 75 N. C. 471; Farnam v. Brooks, 9 Pick. (Mass.) 212; West v. Russell, 48 Mich. 74, 11 N. W. 812; Davis v. Phillips, 85 Mich. 198, 48 N. W. 513; Clark, Cont. 265, and cases there cited.

¹⁰ Ball v. Mannin, 3 Bligh (N. S.) 1; Ewell, Lead. Cas. 534.

¹¹ Dennett v. Dennett, 44 N. H. 531; Bond v. Bond, 7 Allen (Mass.) 1; Brown v. Brown, 108 Mass. 386; Lilly v. Waggoner, 27 Ill. 396; Baldwin v. Dunton, 40 Ill. 188; Titcomb v. Vantyle, 84 Ill. 371; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Burnham v. Mitchell, 34 Wis. 136; Clark, Cont. 266, 267, and cases there cited.

¹² Hall v. Warren, 9 Ves. 605; Lilly v. Waggoner, 27 Ill. 395; McCormick v. Littler, 85 Ill. 62; Beckwith v. Butler, 1 Wash. (Va.) 224; Carpenter v. Carpenter, 8 Bush (Ky.) 283; Staples v. Wellington, 58 Me. 453; Clark, Cont. 266. As to burden of proof in such cases, see cases cited in Clark, Cont. 266, note 201.

afterwards.¹³ Neither need it be shown that the insanity was general. A person who is laboring under an insane delusion is incapable of making a contract if his delusion is so connected with the subject-matter of the particular contract as to prevent him from comprehending its nature and probable consequences. If such was his condition, he may avoid the contract, though he may have been perfectly sane in respect to other matters, and might have been able to make a binding contract in reference to some other subject-matter.¹⁴ The delusion must have been so connected with the subject-matter of the contract to avoid it.¹⁵

Whether Contracts are Void or Voidable.

It has been held by some courts that the deed of an insane person,¹⁶ or a power of attorney or other appointment of an agent,¹⁷ is absolutely void and of no effect whatever. In most states, however, no distinction is made in this respect between the deed of an infant and that of an insane person, or between the deed of an insane person and any other kind of contract; and it is held to be simply voidable.¹⁸ As a general rule, almost universally recognized, all his contracts other than such as the law holds binding upon him are not void, but simply voidable at his option.¹⁹ They

¹³ *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. 936; *Peaslee v. Robbins*, 3 Mete. (Mass.) 164; *Jenners v. Howard*, 6 Blackf. (Ind.) 240.

¹⁴ *Bond v. Bond*, 7 Allen (Mass.) 1; *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Dennett v. Dennett*, 44 N. H. 531; *Searle v. Galbraith*, 73 Ill. 269; *Alston v. Boyd*, 6 Humph. (Tenn.) 504; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Boyce's Adm'r v. Smith*, 9 Grat. (Va.) 704; *West v. Russell*, 48 Mich. 74, 11 N. W. 812.

¹⁵ *Boyce's Adm'r v. Smith*, 9 Grat. (Va.) 704.

¹⁶ *Van Deusen v. Sweet*, 51 N. Y. 378; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *In re Estate of Desilver*, 5 Rawle (Pa.) 111; *Farley v. Parker*, 6 Or. 105; *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175.

¹⁷ *Dexter v. Hall*, 15 Wall. 9.

¹⁸ *Hovey v. Hobson*, 53 Me. 451; *Walt v. Maxwell*, 5 Pick. (Mass.) 217; *Key's Lessee v. Davis*, 1 Md. 32; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Allis v. Billings*, 6 Mete. (Mass.) 415; *Evans v. Horan*, 52 Md. 602; *Burnham v. Kidwell*, 113 Ill. 425; *Eaton v. Eaton*, 37 N. J. Law, 108; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Somers v. Pumphrey*, 24 Ind. 234; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 245; *Allen v. Berryhill*, 27 Iowa, 534.

¹⁹ See cases cited in the preceding note. And see, also, *Carrier v. Sears*, 4 Allen (Mass.) 336; *Chew v. Bank*, 14 Md. 318; *Burke v. Allen*, 29 N. H.

are binding on the sane party if the insane party chooses to hold him.²⁰

Valid Contracts—Quasi Contracts.

Some contracts are binding upon an insane person. As in the case of an infant, the rule that a person may avoid a contract made by him while insane does not apply to contracts created by law, for in these contracts the obligation is imposed by law without regard to the consent of the party bound.²¹

Same—Necessaries.

Nor does the rule apply to the contracts of an insane person for necessities furnished to him or his wife, or, by the weight of authority, to his children.²² The rules as to necessities are substantially the same as in the case of an infant's contracts for necessities, except, it seems, that, unlike an infant, an insane person is liable for labor and materials furnished for the necessary preservation of his estate.²³ In all cases, to render the insane person liable, the credit must have been given to him, and not to some third person. If it is otherwise, no contract will be implied.²⁴ The fact that the party has been judicially declared insane, and placed under guardianship, does not affect the question of his liability for what are in fact necessities.²⁵ The liability of an insane person for necessities, like the liability of an infant, is not a strictly contractual obligation. It is imposed by law, and is quasi contractual.²⁶

106; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Riley v. Carter*, 76 Md. 581, 25 Atl. 667.

²⁰ *Harmon v. Harmon*, 51 Fed. 113; *Allen v. Berryhill*, 27 Iowa, 534.

²¹ *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405.

²² *Read v. Legard*, 6 Exch. 636; *La Rue v. Gilkyson*, 4 Pa. St. 375; *Richardson v. Strong*, 13 Ired. (N. C.) 106; *McCormick v. Littler*, 85 Ill. 62; *Van Horn v. Haun*, 39 N. J. Law. 207; *Shaw v. Thompson*, 16 Pick. (Mass.) 198; *Sawyer v. Lufkin*, 56 Me. 308; *Seeva v. True*, 53 N. H. 627; *Clark*, Cont. 267.

²³ *Williams v. Wentworth*, 5 Beav. 325.

²⁴ *Massachusetts General Hospital v. Fairbanks*, 129 Mass. 78, 132 Mass. 414.

²⁵ *McCrillis v. Bartlett*, 8 N. H. 569; *Sawyer v. Lufkin*, 56 Me. 308; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405; *Fruitt v. Anderson*, 12 Ill. App. 421.

²⁶ *Seeva v. True*, 53 N. H. 627.

Same—Ignorance of Insanity and Good Faith of the Other Party.

By the weight of actual decision, where a contract with an insane person has been executed in part, and the other party cannot be placed in statu quo, it will be enforced, unless it is shown that he did not act in good faith, or that he knew of the other's condition. The leading case holding this doctrine is *Molton v. Camroux*,²⁷ an English case. In this case an insane person had purchased annuities of a society, paid the money, and died, whereupon his administratrix sued the society to recover back the money paid it, on the ground that the contract was void. The jury found that at the time of the contract the deceased was insane, but that there was nothing to indicate this to the society, and that the transaction was in good faith; and it was held that the money could not be recovered. "The modern cases show," it was said, "that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original positions."²⁸ If the lunatic has received no benefit under the contract, it has been held that this doctrine does not apply, and that he can recover what he has parted with, notwithstanding the other party's good faith.²⁹

Some courts have refused to recognize the doctrine of *Molton v. Camroux*, but, on the contrary, hold that, even though a contract

²⁷ 2 Exch. 489; 4 Exch. 17.

²⁸ See, also, *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599; *Eaton v. Eaton*, 37 N. J. Law, 108; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Ingraham v. Baldwin*, 9 N. Y. 45; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Scanlan v. Cobb*, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425; *McCormick v. Littler*, 85 Ill. 62; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Fay v. Burditt*, 81 Ind. 433; *Wilder v. Weakley's Estate*, 34 Ind. 181; *Northwestern Mutual Fire Ins. Co. v. Blankenship*, 94 Ind. 535; *Beals v. See*, 10 Pa. St. 56; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407; *Lincoln v. Buckmaster*, 32 Vt. 652; *Young v. Stevens*, 48 N. H. 136; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Behrens v. McKenzie*, 23 Iowa, 333; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Carr v. Holliday*, 1 Dev. & B. Eq. (N. C.) 344; *Riggan v. Green*, 80 N. C. 236.

²⁹ *Lincoln v. Buckmaster*, 32 Vt. 658; *Van Patton v. Beals*, 46 Iowa, 63.

with an insane person has been executed in whole or in part, it may, nevertheless, be avoided by the insane party, though it was entered into by the other party in perfect good faith, and in ignorance of the insanity, and though the parties cannot be placed in statu quo. In *Seaver v. Phelps*,³⁰ for instance, it was held by the Massachusetts court that, in trover for a note pledged to the defendant by the plaintiff while insane, it was no defense that the defendant, when he took the note, did not know the plaintiff was insane, and had no reason to suspect it, and did not practice any fraud or unfairness. "The fairness of the defendant's conduct," it was said, "cannot supply the plaintiff's want of capacity."

Insane Persons under Guardianship.

In some states it is provided by statute, and in others it is held independently of any statute, that where a person has been judicially determined to be insane, under a regular inquisition, and placed under guardianship, his contracts while under guardianship are absolutely void, and that no inquiry can be made into the question whether he was in fact insane or not.³¹ In other states it has been held that an adjudication of lunacy and guardianship only raise a presumption of incapacity to contract, which may be rebutted by clear proof of capacity.³² To bring a case within the doctrine first stated above, there must not only have been an adjudication of lunacy, but the lunatic must be actually under guardianship when the contract is made. For instance, it has been held that if the guardian is discharged as being an unsuitable person, and no other guardian is appointed, the adjudication is not conclusive as to incapacity after the guardian's discharge.³³

³⁰ 11 Pick. (Mass.) 304. And see *Anglo-Californian Bank v. Ames*, 27 Fed. 727; *Hovey v. Hobson*, 53 Me. 451; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Sullivan v. Flynn*, 20 D. C. 396.

³¹ *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Rannells v. Gerner*, 80 Mo. 474; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Bradbury v. Place* (Me.) 10 Atl. 461; *Mohr v. Tulip*, 40 Wis. 66; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Griswold v. Butler*, 3 Conn. 227.

³² See *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Parker v. Davis*, 8 Jones (N. C.) 460; *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296; *Snook v. Watts*, 11 Beav. 105; *In re Gangwere's Estate*, 14 Pa. St. 417.

³³ *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299.

As has been stated, the fact that an insane person is under guardianship does not affect his liability for necessities.³⁴

SAME—RATIFICATION AND AVOIDANCE OF CONTRACTS.

226. The voidable contract of an insane person may be ratified or disaffirmed by himself when sane, or by his guardian during insanity, or by his personal representatives or heirs after his death.

227. By the weight of authority, the right to disaffirm is personal to the insane party or his representatives, and does not extend to the other party or to strangers.

228. In a few jurisdictions the consideration received by the insane person need not be returned as a condition precedent to avoidance if he is unable to return it, but the weight of authority is the other way. In all jurisdictions it must be returned if it can be.

229. In most jurisdictions the right of disaffirmance can be exercised against bona fide purchasers of land or goods sold by the insane person, or of negotiable instruments executed by him.

The voidable contracts of a person non compos mentis may be ratified or disaffirmed by him when he becomes sane, or during a lucid interval;³⁵ or, during the continuance of his infirmity, by his committee or guardian;³⁶ or, after his death, by his personal representative³⁷ or his heirs.³⁸ The privilege is personal to the in-

³⁴ Ante, p. 421.

³⁵ *Allis v. Billings*, 6 Metc. (Mass.) 416; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Turner v. Rusk*, 53 Md. 65.

³⁶ *Moore v. Hershey*, 90 Pa. St. 196; *Halley v. Troester*, 72 Mo. 73; *McClain v. Davis*, 77 Ind. 419.

³⁷ *Beverley's Case*, 4 Coke, 123b; *Campbell v. Kuhn*, 45 Mich. 513, 8 N. W. 523; *Hovey v. Hobson*, 53 Me. 451; *Schuff v. Ransom*, 79 Ind. 458.

³⁸ *Allis v. Billings*, 6 Metc. (Mass.) 415; *Schuff v. Ransom*, 79 Ind. 458.

sane person, or those who thus represent him; and neither the other party to the contract nor third persons can avoid it.³⁹ Ratification or disaffirmance need not be in express words, but may be by conduct, as in the case of ratification or disaffirmance by a person of a contract made during infancy.⁴⁰

Return of Consideration on Avoidance.

In those jurisdictions where an insane person's contract is voidable, whether it is executed or not, and whether or not the other party acted in good faith and in ignorance of his mental infirmity, a person is not required to restore, or offer to restore, the consideration received by him as a condition precedent to the avoidance of a deed or other contract made by him while insane, though retention and use of the consideration after restoration to sound mind may, as in the case of infants, furnish evidence of ratification of the contract. One of the obvious grounds, it was said by the Massachusetts court, on which the deed of an insane man or an infant is held voidable, is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale; and the same incapacity which makes the deed voidable may have wasted the price, and rendered the restoration of the consideration impossible. "The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On the other hand, it intends that he who deals with infants or insane persons shall do it at his peril. * * * If the law required restoration of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in

³⁹ *Carrier v. Sears*, 4 Allen (Mass.) 336; *Allen v. Berryhill*, 27 Iowa, 534; ante, p. 418. Contra, *Burke v. Allen*, 29 N. H. 106. Sureties are liable on a note executed by an insane person. *Lee v. Yandell*, 69 Tex. 34, 6 S. W. 665.

⁴⁰ *Gibson v. Soper*, 6 Gray (Mass.) 283; *Arnold v. Iron Works*, 1 Gray (Mass.) 434. Disaffirmance by action to avoid. *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270; *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80.

avoiding such contracts—the protection of those who cannot protect themselves—defeated.”⁴¹

As we have already seen, however, most courts do not allow an insane person to avoid his contracts at all where the other party acted in good faith, and in ignorance of his insanity, and cannot be placed in statu quo.

Avoidance as against Third Persons.

The fact that third persons have acquired an interest under the contract of a person non compos mentis, in good faith, for value, and without notice of his infirmity, cannot defeat his right to avoid the contract.⁴² This rule applies to deeds⁴³ and negotiable instruments⁴⁴ as well as to other contracts, and it applies whether the contract be regarded as void or merely voidable. To protect bona fide purchasers in such cases would be to withdraw protection from the insane person.

LIABILITY OF INSANE PERSON FOR TORTS.

230. An insane person is liable, to the extent of the actual damage, for torts involving no mental element; but he is not liable for torts of which malice is an essential element; nor is he liable for exemplary damages.

The general rule is that an insane person is liable for his torts, which involve no mental element, to the extent of the actual damage.⁴⁵ He is liable, for instance, in tort for causing the death of

⁴¹ *Gibson v. Soper*, 6 Gray (Mass.) 279; *Hovey v. Hobson*, 53 Me. 453.

⁴² *Hovey v. Hobson*, 53 Me. 451; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270; *Long v. Fox*, 100 Ill. 43; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512.

⁴³ *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512. In North Carolina it is held that the deed of a lunatic, duly recorded, cannot be avoided as against bona fide purchasers. *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609.

⁴⁴ *Anglo-Californian Bank v. Ames*, 27 Fed. 727; *Wirsbach's Ex'r v. Bank*, 97 Pa. St. 543; *McClain v. Davis*, 77 Ind. 419.

⁴⁵ 1 Jag. Torts, 154; *Weaver v. Ward*, Hob. 134; *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239; *Morse v. Crawford*, 17 Vt. 499; *Behrens v. McKenzie*, 23 Iowa, 333; *Cross v. Kent*, 32 Md. 581; and cases hereafter cited.

another,⁴⁶ for trespass on land,⁴⁷ for conversion,⁴⁸ for assault and battery,⁴⁹ for false imprisonment,⁵⁰ for negligence.⁵¹ In a late Illinois case it was said: "There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted by a lunatic. He has properly no will. His acts lack the element of intent or intention. Hence it would seem to follow that the only proper measure of damages in an action against him for a wrong is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrongdoers. There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid, for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries on others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity, with a view of masking the malice and revenge of an evil heart."⁵²

An insane person, being incapable of entertaining malice, cannot commit a tort in which malice is an essential element, like malicious prosecution, libel, and slander.⁵³ As was said by the

⁴⁶ *McIntyre v. Sholty*, supra; *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902.

⁴⁷ *Amick v. O'Hara*, 6 Blackf. (Ind.) 258.

⁴⁸ *Morse v. Crawford*, 17 Vt. 499.

⁴⁹ *Taggard v. Innes*, 12 U. C. C. P. 77.

⁵⁰ *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647.

⁵¹ *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449; *Morain v. Devlin*, 132 Mass. 87; *Behrens v. McKenzie*, 23 Iowa, 333.

⁵² *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239.

⁵³ 1 *Jag. Torts*, 157; *Gates v. Meredith*, 7 Ind. 440; *Bryant v. Jackson*, 6 *Humph. (Tenn.)* 199; *Horner v. Marshall's Adm'x*, 5 *Munf. (Va.)* 436.

Indiana court: "Slander must be malicious. An idiot or lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of one who 'knows better.'" ⁵⁴

In no case can more than actual damages be recovered from a lunatic for his torts. Exemplary damages being allowed on the ground of malice or evil intent, and an insane person being incapable of malice, they can never be recovered.⁵⁵

RESPONSIBILITY OF INSANE PERSON FOR CRIME.

231. Since a criminal intent is an essential element of every crime, no person is criminally responsible for an act if, at the time it is committed, he is so insane as to be incapable of entertaining such an intent.

232. Insanity may have the following effects:

- (a) It may render a person incapable of determining between right and wrong, in which case there is no criminal responsibility.
- (b) It may render him incapable of knowing what he is doing in the particular instance only, as in the case of insane delusions or partial insanity, in which case his responsibility depends upon the facts as they appear to him.
- (c) It may deprive him of freedom of will, as in the case of irresistible impulses, where the party knows what he is doing, but is irresistibly driven to do it. Perhaps most courts refuse to recognize such a phase of insanity as a ground of exemption; but, by the better opinion, such an impulse, if shown to have been caused by disease of the mind, does exempt the victim from responsibility.

⁵⁴ Gates v. Meredith, *supra*.

⁵⁵ 1 Jag. Torts, 158; Avery v. Wilson, 20 Fed. 856; Krom v. Schoonmaker, 3 Barb. (N. Y.) 647.

233. Moral or emotional insanity, as distinguished from mental, does not exempt one from criminal responsibility.

234. A person cannot be tried if he is insane, though he may have been sane when he committed the act, as he is deemed incapable of conducting his defense. Nor can an insane person be sentenced or punished, though he may have been convicted while sane.

The leading case on the subject of insanity as a defense in criminal prosecutions is *McNaghten's Case*, which arose in England in 1843.⁵⁶ After the defendant had been acquitted in that case on the ground of insanity, the question came up on debate in the house of lords, and the opinion of the judges was asked. They answered, among other things, that jurors should be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved (1) that, at the time the act was committed, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong; or (2) that if a person is laboring under a partial delusion, not being in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real; that if, for example, a person, under the influence of his delusion, supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment, but if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

⁵⁶ 10 Clark & F. 200.

Inability to Distinguish between Right and Wrong.

This answer of the judges, it will be noticed, holds that a person is not criminally responsible for his act if he was so insane that he did not know the nature and quality of the act, or if he did not know it was wrong. This rule is universally recognized.⁵⁷ The incapacity in such cases may arise from idiocy, as well as from mania.⁵⁸ The defect of reason need not be general nor permanent. It is enough if the party did not know that the particular act was wrong at the time he committed it, though he may have had his reason shortly before the act, and may have recovered it afterwards, and though he may have been able to distinguish between right and wrong as to other acts.

Insane Delusions.

The answer of the judges in *McNaghten's Case* on the question of insane delusions has been since recognized as the law in this country, as well as in England. If, when a man commits an act, he is laboring under an insane delusion as to that particular act, not being otherwise insane, his responsibility depends upon the facts as they seemed to him.⁵⁹ If a man kills another under the insane delusion that the other is attempting to take his life, he is excused. But, where a man killed another under the insane delusion that the latter was trying to marry his mother, he was held responsible for the murder, since this fact, even if it really existed, would be no defense.⁶⁰ So, where a convict killed a fellow convict, it was rightly held, on the same principle, that a delusion that the deceased had divulged a plan of escape was no defense.⁶¹

There must have been an actual delusion, and the act must have been immediately connected with it. If a person knows all the facts

⁵⁷ *Flanagan v. People*, 52 N. Y. 467; *Dunn v. People*, 109 Ill. 635; *Hornish v. People*, 142 Ill. 620, 32 N. E. 677; *Clark, Cr. Cas.* 53, 54, where cases are collected.

⁵⁸ *Com. v. Heath*, 11 Gray (Mass.) 303; *Ortwein v. Com.*, 76 Pa. St. 414.

⁵⁹ *McNaghten's Case*, 10 Clark & F. 200; *Hadfield's Case*, 27 How. State Tr. 1282; *Com. v. Rogers*, 7 Metc. (Mass.) 500; *People v. Pine*, 2 Barb. (N. Y.) 571; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Thurman v. State*, 32 Neb. 224, 49 N. W. 338; *Clark, Cr. Law*, 54, 55, and cases there cited.

⁶⁰ *Bolling v. State*, 54 Ark. 588, 16 S. W. 658.

⁶¹ *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275.

as to which he acts, he is not exempt, though he may have had insane delusions as to other facts.⁶²

Irresistible Impulse.

Where a person, from disease of the mind, and not from mere moral depravity and long indulgence in vice, is incapable of restraining himself, many of the courts hold that he is exempt from responsibility, though he may have known that he was doing what was wrong. In other words, it is held that a person may know that he is doing wrong when he commits an act, but, by reason of the duress of a mental disease, he may have lost the power to choose between the right and the wrong, and to avoid doing the act, and that when this is shown to be the case, he is not criminally responsible.⁶³ Most of the courts, perhaps, have refused to recognize any such ground of exemption, and limit the test of responsibility to ability to distinguish between right and wrong.⁶⁴ If such a condition can exist,—and the doctors say that it does,—it ought to exempt from responsibility as fully as any other kind of insanity. Great care should be taken in recognizing such a ground of exemption; and it should be clear that the irresistible impulse is due to disease of the mind, and not to moral depravity.

Moral and Emotional Insanity.

A perverted condition of the moral system is sometimes spoken of as "moral insanity." It is never a ground of exemption from criminal responsibility. Though, from low associations and constant indulgence in vice, a man's moral system has become so morbid, and his passions so uncontrollable, that his conscience or sense of right and wrong will not restrain him, he is, nevertheless, responsible for his acts, if his mind is sound.⁶⁵ So, "emotional insanity," as it is

⁶² Freeman v. People, 4 Denio (N. Y.) 9; Clark, Cr. Law, 55, and cases there cited.

⁶³ Clark, Cr. Law, 56, 57, and cases there cited; Parsons v. State, 81 Ala. 577, 2 South. 854; Com. v. Rogers, 7 Metc. (Mass.) 500; People v. Finley, 38 Mich. 482; State v. Jones, 50 N. H. 369; Hopps v. People, 31 Ill. 385; Dacey v. People, 116 Ill. 555, 6 N. E. 165.

⁶⁴ Clark, Cr. Law, 56, and cases there cited; Reg. v. Stokes, 3 Car. & K. 185; Flanagan v. People, 52 N. Y. 467; State v. Harrison, 36 W. Va. 729, 15 S. E. 982; State v. Alexander, 30 S. C. 74, 8 S. E. 440.

⁶⁵ Clark, Cr. Law, 57, 58, and cases there cited; Flanagan v. People, 52 N. Y. 467; People v. Finley, 38 Mich. 482; Leache v. State, 22 Tex. App. 279, 3 S. W. 539. But see Scott v. Com., 4 Metc. (Ky.) 227.

called, or temporary passion, arising from excitement or anger, and not from mental disease, is no defense.⁶⁶

Insanity after Commission of Crime.

If a person becomes insane after he has committed a crime, this does not render him any the less guilty. But he cannot be arraigned and put upon his trial while he is insane; and if he becomes insane after he has been arraigned, but before judgment, the trial must end.⁶⁷ The reason of this is that an insane person cannot properly defend himself. So, if he becomes insane after a conviction and sentence, he cannot be punished. Such insanity, however, does not prevent his being tried and punished if he subsequently becomes sane.

CAPACITY TO MAKE A WILL.

235. A person who is of unsound mind to such an extent as to be incapable of comprehending the condition of his property and his relations to the persons who are or might be the objects of his bounty, and of collecting in his mind, without prompting, the elements of the business to be transacted, and to hold them there until their relation to each other can be perceived, and a rational judgment in respect thereto formed, is incapable of making a will.

236. A person under guardianship is prima facie wanting in testamentary capacity, but his will is valid if it be shown that he was in fact of sound mind.

To be capable of making a valid will, a person must be of sound mind. Blackstone says that "mad men, or otherwise non compotes, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness, all these are incapable, by reason of mental disability, to make any will so long as such disability lasts."⁶⁸ Where it is

⁶⁶ Clark, Cr. Law, 58, and cases there cited; *People v. Mortimer*, 48 Mich. 37, 11 N. W. 776; *People v. Foy*, 138 N. Y. 664, 34 N. E. 396.

⁶⁷ Clark, Cr. Proc. 427, 428, and cases there cited.

⁶⁸ 2 Bl. Comm. 497.

shown that a testator was an idiot or totally insane, there can be no difficulty in declaring the will void. The question of testamentary capacity, however, is often very difficult, where it is sought to show partial insanity or insane delusions, or to show a slight degree of mental disorder.

The degree of mental capacity has been variously stated. In a New York case it was said: "The testator should be capable of comprehending the condition of his property, and his relations to the persons who are or might have been the objects of his bounty. He should be able to collect in his mind, without prompting, the elements of his business to be transacted, and hold them there until their relations to each other can be perceived, and a rational judgment in respect thereto be formed."⁷⁰ And in a Pennsylvania case it was said: "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he collect all these in one review. If he understands, in detail, all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will. If, from any cause, he is so enfeebled in mind as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of understanding to whom he intends to bequeath it, he is without the requisite testamentary capacity."⁷¹

A man is presumed to have been sane until the contrary is proved. Therefore, where a will is proved, and is objected to on the ground of want of mental capacity, the burden of proof is on the contestant.⁷² But, when settled insanity is proven to have

⁷⁰ *Van Guysling v. Van Kuren*, 35 N. Y. 70. And see *Converse's Ex'r v. Converse*, 21 Vt. 168; *American Bible Soc. v. Price*, 115 Ill. 623, 5 N. E. 126; *In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337; *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Abb. Desc., Wills & Adm.* 227.

⁷¹ *Wilson v. Mitchell*, 101 Pa. St. 495. And see *Shaver v. McCarthy* (Pa. Sup.) 5 Atl. 614.

⁷² *Brooks v. Barrett*, 7 Pick. (Mass.) 94.

existed prior to the date of the will, its continuance will be presumed, and the burden is on the proponent to show that the will was made in a lucid interval.⁷³

If the testator, at the time of making his will, was laboring under an insane delusion as to the natural objects of his bounty, which affected its provisions, it will be held invalid.⁷⁴ Thus, a will disinheriting a son would be invalid if the testator was under an insane delusion that the son was not his own. But a delusion not arising from mental disorder would be immaterial. Thus, the testator's mistaken opinion that his child is illegitimate will not invalidate his will.⁷⁵ A will is not affected even by an insane delusion that has no connection with it.⁷⁶

Wills are most frequently contested for mental incapacity on the ground of senile dementia, which results from a decay and wearing out of the mental faculties in old age. If, from such a cause, a person has not sufficient mental capacity, within the rules above stated, he cannot make a valid will.⁷⁷ A person is not rendered incompetent to make a will by deafness, dumbness, or blindness, if his mind is sound.⁷⁸ Nor does mere eccentricity render him incompetent.⁷⁹

The fact that a testator was under guardianship as non compos

⁷³ *Attorney General v. Parnter*, 3 Brown, Ch. 443. "Lunacy being once established, the burden is on the party claiming through some act of the lunatic to show that it was done in a lucid interval; and, a return to insanity being proved, the burden is upon the party claiming a relapse into insanity." *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486.

⁷⁴ *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619. And see *Dew v. Clarke*, 5 Russ. 163; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Ballantine v. Proudfoot*, 62 Wis. 216, 22 N. W. 392; *Smee v. Smee*, 32 Moak, 311, 5 Prob. Div. 84, Abb. Desc., Wills & Adm. 205; *Morse v. Scott*, 4 Dem. Sur. (N. Y.) 507, Abb. Desc., Wills & Adm. 209.

⁷⁵ *Clapp v. Fullerton*, 34 N. Y. 190. And see *Stackhouse v. Horton*, 15 N. J. Eq. 202.

⁷⁶ See *Banks v. Goodfellow*, L. R. 5 Q. B. 549, Abb. Desc., Wills & Adm. 211; *Smee v. Smee*, 32 Moak, 311, 5 Prob. Div. 84, Abb. Desc., Wills & Adm. 205.

⁷⁷ As to senile dementia, and incapacity on that ground, see *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Blanchard v. Nestle*, 3 Denio (N. Y.) 37.

⁷⁸ *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *In re Barber*, 39 Ch. Div. 187.

⁷⁹ *In re Smith's Will*, 52 Wis. 543, 8 N. W. 616.

mentis at the time he made the will does not render the will invalid, if it can be shown that he was in fact of sound mind. But the fact of guardianship is *prima facie* evidence of insanity and incapacity to make a will, and the burden of showing the contrary is on the proponent.⁸⁰

CONTRACTS OF DRUNKEN PERSONS.

237. A contract or conveyance made by a person when he is so drunk that he is incapable of understanding its nature and effect is voidable at his option. He is liable, however, on contracts created by law, and for necessities.

238. The rules as to ratification and avoidance are substantially the same as in the case of infants and insane persons. Some courts, however, hold that the right of avoidance cannot be exercised against *bona fide* purchasers for value.

A drunken person is in exactly the same position as an insane person with respect to his capacity to enter into contracts. It was formerly considered that a man should not be permitted to stultify himself by pleading drunkenness when sued upon a contract, or for the purpose of avoiding a deed; but this doctrine has long since been exploded, and it is now perfectly well settled that a contract or conveyance made by a drunken person is voidable at his option if his drunkenness was so excessive as to render him incapable of comprehending its nature and effect, or, in other words, of knowing what he was doing.⁸¹ The contract or conveyance is not

⁸⁰ *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. (Mass.) 115.

⁸¹ *Clark*, Cont. 274, and cases there cited; *Gore v. Gibson*, 13 Mees. & W. 623; *Barrett v. Buxton*, 2 Aiken (Vt.) 167; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156; *Miller v. Finley*, 26 Mich. 254; *Foss v. Hildreth*, 10 Allen (Mass.) 76; *Van Wyck v. Brasher*, 81 N. Y. 260; *Shackelton v. Sebree*, 86 Ill. 616; *Bates v. Ball*, 72 Ill. 108; *Newell v. Fisher*, 11 Smedes & M. (Miss.) 431; *Broadwater v. Darne*, 10 Mo. 277. Slight intoxication is not enough to render a contract voidable. It must be so excessive as to render the party incapable of knowing what he is doing. *Van Wyck v. Brasher*, *supra*; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001; *Van Horn v. Keenan*, 28 Ill. 445.

void, but simply voidable, at the option of the drunken party. It makes no difference that the intoxication was voluntary, and not fraudulently induced or caused by the other party.⁸² The defense of drunkenness to defeat a contract is personal, like the defense of infancy and insanity, and can only be set up by the party or his representative. The other party cannot avoid the contract, nor can it be attacked by third persons.⁸³

Some courts make no distinction between cases in which the drunken person is under guardianship and other cases; but hold the contract or conveyance merely voidable in both cases.⁸⁴ Other courts hold that in the former case it is absolutely void.⁸⁵ A drunken person, like an infant or an insane person, is liable for necessities furnished to him, or to his wife or children.⁸⁶

Ratification and Avoidance.

The principles governing the ratification or avoidance of a contract and conveyance by a person who was drunk when he made it are the same as in the case of insane persons. He may either ratify or avoid it when he is sober. And ratification may be by conduct, as by retaining the consideration, or failure to disaffirm for an unreasonable time.⁸⁷ After the contract or conveyance has been ratified, it is binding absolutely, and cannot then be avoided.⁸⁸ On avoidance, the consideration must be returned, or an offer be made to return it,⁸⁹ unless, perhaps, it was wasted before the party became sober.⁹⁰

Some courts hold that drunkenness is no defense as against innocent third persons who acquire rights under or through the contract or conveyance for value and without notice; that a party to a negotiable instrument, or the grantor of land, cannot set up his in-

⁸² See the cases above cited. But see *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478.

⁸³ *Matthews v. Baxter*, L. R. 8 Exch. 132; *Eaton's Adm'r v. Perry*, 29 Mo. 96.

⁸⁴ Appeal of *Donehoo* (Pa. Sup.) 15 Atl. 924.

⁸⁵ *Wadsworth v. Sharpsteen*, 8 N. Y. 388.

⁸⁶ *Gore v. Gibson*, 13 Mees. & W. 623; *McCrillis v. Bartlett*, 8 N. H. 569.

⁸⁷ *Williams v. Inabnet*, 1 Bailey (S. C.) 343; *Reinskopf v. Rogge*, 37 Ind. 207; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753; *Mansfield v. Watson*, 2 Iowa, 111.

⁸⁸ *Matthews v. Baxter*, L. R. 8 Exch. 132; *Joest v. Williams*, 42 Ind. 565.

⁸⁹ *Joest v. Williams*, 42 Ind. 565.

⁹⁰ *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311.

toxication at the time he delivered the instrument or conveyance, as against a bona fide holder or a bona fide purchaser of the land, for value.⁹¹ Other courts allow such a defense even as against them, to the same extent as if the party had been insane.⁹²

LIABILITY OF DRUNKEN PERSON FOR TORTS.

239. A drunken person is liable for his torts to the same extent as if he were sober, except that the fact of drunkenness may mitigate the damages by excluding the question of malice.

The fact that a man is drunk when he commits a tort may in some cases mitigate the damages, by excluding the question of malice,⁹³ but otherwise it is no defense. He is liable in damages for any tortious conduct, even though he may have been so drunk that he did not know what he was doing.⁹⁴

RESPONSIBILITY OF DRUNKEN PERSON FOR CRIME.

240. Voluntary drunkenness furnishes no ground of exemption from responsibility for crime, unless the act is committed while the party is laboring under settled insanity or delirium tremens, resulting from intoxication. But, where a specific intent is an essential ingredient of the particular crime the fact of intoxication may negative its existence; and in homicide cases it may be material in determining

⁹¹ *Johnson v. Medlicott*, 3 P. Wms. 130, note; *State Bank v. McCoy*, 69 Pa. St. 204; *McSparran v. Neeley*, 91 Pa. St. 17. See Norton, Bills & N. 216-223.

⁹² *Gore v. Gibson*, 13 Mees. & W. 623; *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70; *Jenners v. Howard*, 6 Blackf. (Ind.) 240; *Hawkins v. Bone*, 4 Fost. & F. 311.

⁹³ 1 Jag. Torts, 166; *Dawson v. State*, 16 Ind. 428.

⁹⁴ 1 Jag. Torts, 165; *Reed v. Harper*, 25 Iowa, 87; *Cassady v. Magher*, 85 Ind. 228; *McKee v. Ingalls*, 4 Scam. (Ill.) 30; *Alger v. City of Lowell*, 3 Allen (Mass.) 402.

whether, in the case of adequate provocation to reduce the killing to manslaughter, the party acted under the provocation or from malice.

Nothing is better settled in the criminal law than that voluntary drunkenness does not exempt a man from responsibility for his crimes.⁹⁵ In England, nearly 500 years ago, it was said that, "if a man that is drunk kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby."⁹⁶ The rule does not apply where settled insanity or delirium tremens results from voluntary drunkenness; but in such a case the party is in the same position as if he were insane from any other cause.⁹⁷ Nor does the rule apply to crimes of which a specific intent is an essential element, like burglary, where the specific intent to commit a felony is essential, or robbery, or larceny, or assault with intent to kill. Nor, in some states, does it apply to murder in the first degree, as a specific intent to kill is necessary, and general malice is not sufficient, as at common law. Where a man, when he commits an act, is too drunk to entertain a specific intent which is necessary to make that act a particular crime, and did not first form such intent, and then become intoxicated, he cannot be guilty of that particular crime.⁹⁸ But he may be guilty of some other crime for which no specific intent is necessary. Thus drunkenness may prevent a man from being guilty of assault with intent to kill, but he may be convicted of common assault, for in the latter case no specific intent is necessary. Drunkenness

⁹⁵ Clark, Cr. Law, 60; *Beverley's Case*, 4 Coke, 125a; *People v. Rogers*, 18 N. Y. 9; *U. S. v. Drew*, 5 Mason, 28, Fed. Cas. No. 14,933; *People v. Garbutt*, 17 Mich. 9; *People v. Walker*, 38 Mich. 156; *Com. v. Hawkins*, 3 Gray (Mass.) 463; *McIntyre v. People*, 38 Ill. 514; *Rafferty v. People*, 66 Ill. 118; *Upstone v. People*, 109 Ill. 169; *State v. Welch*, 21 Minn. 22; *Choice v. State*, 31 Ga. 424.

⁹⁶ *Reniger v. Fogossa*, Plow. 19.

⁹⁷ *People v. Hammill*, 2 Parker, Cr. R. (N. Y.) 223; *Reg. v. Davis*, 14 Cox, Cr. Cas. 563; *U. S. v. McGlue*, 1 Curt. 1, Fed. Cas. No. 15,679; *Beasley v. State*, 50 Ala. 149; *State v. Robinson*, 20 W. Va. 713.

⁹⁸ *Reg. v. Doody*, 6 Cox, Cr. Cas. 463.

is no defense in a prosecution for murder at common law;⁹⁹ but evidence of drunkenness is material on the question whether a homicide is statutory murder in the first degree, in those jurisdictions where an actual intent to kill is necessary.¹⁰⁰ And, by the weight of opinion, evidence of drunkenness is admissible on the question whether, where there was sufficient provocation to reduce a homicide to manslaughter, the accused acted under the influence of passion caused by the provocation, or from malice.¹⁰¹ If a person is made drunk by the stratagem or fraud of another, he is not responsible.¹⁰²

CAPACITY OF DRUNKEN PERSON TO MAKE A WILL.

241. Drunkenness renders a person incompetent to make a will, if it affects his mind to such an extent that he would be incompetent in case of insanity.

The mere fact that a person is addicted to drink, and is under guardianship, as incapable of managing his estate, does not render him incompetent to make a will.¹⁰³ Nor does the mere fact of drunkenness at the time of making a will render it invalid, unless it was so great as to render the testator incapable of understanding the nature and effect of the will, within the rules shown in treating of insanity.¹⁰⁴ If it has this effect, the will is void.¹⁰⁵ Inebriety, although long continued, and resulting occasionally in temporary insanity, does not require proof of lucid intervals to give validity to the party's

⁹⁹ *State v. McCants*, 1 Speer (S. C.) 384; *Kelly v. State*, 3 Smedes & M. (Miss.) 518.

¹⁰⁰ *State v. Johnson*, 40 Conn. 136; *People v. Walker*, 38 Mich. 156; *Hopt v. People*, 104 U. S. 631; *Willis v. Com.*, 32 Grat. (Va.) 929; *Swan v. State*, 4 Humph. (Tenn.) 136; *Pirtle v. State*, 9 Humph. 663; *Clark*, Cr. Law, 63, 64, and cases there cited.

¹⁰¹ *People v. Rogers*, 18 N. Y. 9; *Pearson's Case*, 2 Lewin, Crown Cas. 144; *McIntyre v. People*, 38 Ill. 514; *Clark*, Cr. Law, 65.

¹⁰² *Pearson's Case*, 2 Lewin, Crown Cas. 144.

¹⁰³ *In re Slinger's Will*, 72 Wis. 22, 37 N. W. 236; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069.

¹⁰⁴ *Andress v. Weller*, 3 N. J. Eq. 604; *Kahl v. Schober*, 35 N. J. Eq. 461; *Starrett v. Douglass*, 2 Yeates (Pa.) 48; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, Abb. Desc., Wills & Adm. 236; *Hewitt's Appeal*, 55 Md. 509.

¹⁰⁵ See cases cited above.

will, as is required where general insanity is proved. Therefore, where habitual intoxication is shown, there will be no presumption that there was incapacitating drunkenness at the time the will was made. Such a condition must be affirmatively proved, or the presumption of capacity will prevail.¹⁰⁰

ALIENS.

242. An alien is a person born out of the jurisdiction of the United States, subject to some foreign government, and who has not been naturalized under their constitution and laws. Children of citizens of the United States born abroad are citizens.
243. An alien domiciled in the United States is subject to the laws of the United States and of the state in which he resides to the same extent as a citizen.
244. An alien has the same rights as a citizen with respect to acquiring, holding, and disposing of personal property, and may contract in relation thereto, and sue and be sued on his contracts.
245. An alien may also sue and be sued for torts.
246. At common law, an alien cannot take or transmit land by descent. But he can take by devise or purchase subject to the right of the state to enforce a forfeiture by inquest and office found. His title is good as against all persons but the state, and is good as against the state until office found. And an alien can dispose of land acquired by purchase or devise, and his grantee or devisee will take a good title against every person but the state. The common law in this respect has been abolished in some states, and modified in others, by statute.
247. An alien enemy cannot, without leave of the government, make any fresh contract, or enforce any

¹⁰⁰ In re Lee's Will, 46 N. J. Eq. 193, 18 Atl. 525.

existing contract, during the continuance of war between his government and the United States. Some courts require adherence to the enemy by a resident alien to disqualify him. He may be sued on existing contracts, and in such a case he may defend. Pre-existing contracts are not dissolved by the war unless they are of a continuing nature, and antagonistic to the rules governing a state of war.

An alien is a person born out of the jurisdiction of the United States, subject to some foreign government, and who has not been naturalized under their constitution and laws.¹⁰⁷ A citizen of the United States does not cease to be a citizen merely by residing in a foreign country; and even at common law, as well as by an act of congress, children of citizens of the United States, though born abroad, are citizens of the United States, and not aliens.¹⁰⁸ Whether a citizen has a right to expatriate himself is a question upon which there has been much conflict of opinion. By the better opinion, a citizen may renounce his allegiance at pleasure, if he acts in good faith, and becomes a citizen and subject of a foreign government.¹⁰⁹ Some authorities say that he cannot do so without the

¹⁰⁷ 2 Kent, Comm. 50; Dawson's Lessee v. Godfrey, 4 Cranch, 321; Ainslie v. Martin, 9 Mass. 454.

¹⁰⁸ Ludlam v. Ludlam, 26 N. Y. 356; Crane v. Reeder, 25 Mich. 303; Davis v. Hall, 1 Nott & McC. (S. C.) 292; Campbell v. Wallace, 12 N. H. 362. Rev. St. U. S. 1878, § 1993, declares: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." The child of one who has renounced his citizenship of the United States, and become a citizen and subject of a foreign government, born after such renunciation, is not a citizen, but an alien. Browne v. Dexter, 66 Cal. 39, 4 Pac. 913.

¹⁰⁹ In a Kentucky case it was said: "The government, for the purpose of preventing abuse, and securing the public welfare, may regulate the mode of expatriation. But where it has not prescribed any limitation on this right, and the citizen has in good faith abjured his country, and become a citizen or subject of a foreign nation, he should, as to his native

consent of the government.¹¹⁰ It seems that none of the authorities hold that a citizen casts off his allegiance before he becomes a citizen or subject of a foreign government.¹¹¹ The question has been set at rest in this country, and in some others, by statutes declaring the right of expatriation to exist.¹¹² An alien woman who marries a citizen of the United States becomes a citizen;¹¹³ and the same is true of an alien woman whose husband becomes naturalized.¹¹⁴

Aliens are Subject to the Laws.

As a general rule, aliens domiciled in this country are just as much subject to the laws of the United States, and of the state in which they reside or may be, as citizens. As was said by Mr. Justice Field in *Carlisle v. U. S.*,¹¹⁵ the alien, while domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. He is bound to obey all the laws of the country not immediately relating to citizenship, during his sojourn in it, and he is equally amenable with citizens for any infractions of those laws. It was said by Daniel Webster, when secretary of state, in a report to the president: "Independently of a residence, with intention to continue such residence, independently of any domiciliation, independently of the taking of any oath of allegiance, or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born,

government, be considered as denationalized." *Alsberry v. Hawkins*, 9 Dana (Ky.) 178. Secretary Cass went so far as to deny the right of governments to prohibit expatriation except where the act of expatriation, if recognized, would deprive the government of the power to punish the citizen or subject for an offense previously committed. He said: "The moment a foreigner becomes naturalized, his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country." *Hal. Int. Law*, c. 29, § 4.

¹¹⁰ *Ludlam v. Ludlam*, 26 N. Y. 356, collating the authorities.

¹¹¹ *Ludlam v. Ludlam*, *supra*.

¹¹² Rev. St. U. S. 1878, § 1999. See, on this question, Glenn, *Int. Law*, 129-131.

¹¹³ *Luhrs v. Eimer*, 80 N. Y. 171.

¹¹⁴ *Headman v. Rose*, 63 Ga. 458.

¹¹⁵ 16 Wall. 147.

for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.”¹¹⁶

This rule does not apply to foreign friendly sovereigns and their attendants, nor to foreign ambassadors, ministers, and diplomatic agents, and their servants; but it does apply to consuls, who are mere commercial agents.¹¹⁷

Rights and Liabilities of Alien Friends.

An alien at common law, as well as under the statutes of the different states, has substantially the same powers as a citizen with respect to acquiring, holding, and disposing of personal property; and, like a citizen, he may make contracts with respect to personal property, and sue and be sued thereon.¹¹⁸

If he commits a tort, he may be sued therefor, and he may sue to recover for a tort committed against him, to the same extent as a citizen. It has even been held that one alien may sue another in our courts upon a contract made abroad, or for a tort committed abroad, if both parties are transiently here.¹¹⁹

At common law an alien is under disabilities with respect to acquiring and holding land; and the common law in this respect is still in force in some jurisdictions, or has been declared in whole or in part by statute. An alien at common law can take land by purchase or by devise, but he takes the title subject to the right of the sovereign—with us the state—to enforce a forfeiture. He can

¹¹⁶ 6 Webst. Works, 526, quoted with approval in *Carlisle v. U. S.*, 16 Wall 147. And see *Olcott v. Maclean*, 73 N. Y. 223; *People v. McLeod*, 1 Hill (N. Y.) 377, 25 Wend. (N. Y.) 483.

¹¹⁷ 1 Kent, Comm. 38 et seq.; *State v. De La Foret*, 2 Nott & McC. (S. C.) 217; *Respublica v. De Longchamps*, 1 Dall. 111.

¹¹⁸ Thus, an alien mortgagee, independently of any statute or any treaty stipulations, may come into a court of equity, and have the land sold to satisfy the mortgage debt; the demand being merely a personal one. *Hughes v. Edwards*, 9 Wheat. 489. The right to reside in a foreign country implies the right to labor there for a living. *Baker v. Portland*, 5 Sawy. 566, Fed. Cas. No. 777.

¹¹⁹ *Roberts v. Knights*, 7 Allen (Mass.) 449; *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31.

hold the same against all persons but the state, and he holds as against the state until office found; that is, until proper proceedings have been instituted, and a judgment rendered declaring a forfeiture. Upon inquest and office found, but not before, the land is forfeited to the state.¹²⁰ At common law, and unless, as is the case in some jurisdictions, he is restrained by statute, an alien can devise or convey land acquired by purchase or devise, and the grantee or devisee will take a good title as against every person except the state. The title remains voidable, however, by the state.¹²¹

But an alien, at common law, cannot take land by descent.¹²² He may take, as it is said, by act of the party, but not by operation of law. Nor can an alien transmit land by descent. No one—not even a citizen—can claim by inheritance from or through an alien. On the death of an alien intestate his land vests in the state immediately and without office found.¹²³ Nor, at common law, can an alien wife claim dower,¹²⁴ or an alien husband claim as tenant by the curtesy.¹²⁵

The doctrine of equitable conversion enables a devise or conveyance of land to a trustee to sell the same, and pay over the proceeds to an alien; for such a devise or conveyance is not of

¹²⁰ See *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 620; *Doe v. Robertson*, 11 Wheat. 332; *Fox v. Southack*, 12 Mass. 143; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Harley v. State*, 40 Ala. 689; *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399.

¹²¹ *Crane v. Reeder*, 21 Mich. 24; *Marx v. McGlynn*, 88 N. Y. 357; *Emmett v. Emmett*, 14 Lea (Tenn.) 369; *Jones v. McMasters*, 20 How. 21; *Harley v. State*, 40 Ala. 689; *Hepburn v. Dunlop*, 1 Wheat. 198.

¹²² See cases above cited; and see *Dawson's Lessee v. Godfrey*, 4 Cranch, 321; *Orr v. Hodgson*, 4 Wheat. 453; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Crane v. Reeder*, 21 Mich. 24; *Goodrich v. Russell*, 42 N. Y. 177.

¹²³ *Slater v. Nason*, 15 Pick. (Mass.) 345; *Foss v. Crisp*, 20 Pick. 121; *Jackson v. Fitz Simmons*, 10 Wend. (N. Y.) 9. As to the effect of a common ancestor's alienage, see, also, *Jackson v. Green*, 7 Wend. (N. Y.) 333; *McCreery's Lessee v. Somerville*, 9 Wheat. 354; *McCarthy v. Marsh*, 5 N. Y. 263; *McGregor v. Comstock*, 3 N. Y. 409; *McLean v. Swanton*, 13 N. Y. 535.

¹²⁴ *Sutliff v. Forgey*, 1 Cow. (N. Y.) 89.

¹²⁵ *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Hatfield v. Sneden*, 54 N. Y. 280; *Mussey v. Pierre*, 24 Me. 559.

land, but of personalty.¹²⁶ Under the same doctrine, a devise of money to trustees to invest the same in land to be conveyed to an alien would be a devise of land, and not of money, and would vest him with a defeasible title at common law, or would be void under a statute declaring void a devise of land to an alien.¹²⁷

Such are the rules of the common law; but in most states they have been either altogether abolished, or greatly modified by statute. In some states the common law is still in force, while in others it is expressly declared by statute.¹²⁸ In others, nonresident aliens are not given the right to acquire or hold real property, while resident aliens are.¹²⁹ And, in others, aliens, whether resident or nonresident, are given the same right as native-born subjects as to acquiring and holding real property, either by descent or by purchase, and of disposing of the same or transmitting by descent. The laws of the states in respect to the disability of aliens is to some extent controlled by treaties between the United States and foreign governments. Though the right of aliens to hold real property is dependent upon the laws of the state in which the property is situated, the state law must give way if it conflicts with any existing treaty between the government of the United States and the government of the country of which such alien is a subject or citizen. "If the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property."¹³⁰ In some states the constitution expressly prohibits the legislature from depriving resident foreigners of the rights enjoyed by native-born citizens with respect to the acquisition, enjoyment,

¹²⁶ *Meakings v. Cromwell*, 5 N. Y. 136. A devise of land to executors, who are citizens, in trust to pay the income to aliens, is valid. *Marx v. McGlynn*, 88 N. Y. 357; *Craig v. Leslie*, 3 Wheat. 563.

¹²⁷ *Beekman v. Bonsor*, 23 N. Y. 298.

¹²⁸ See *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195; *Zundell v. Gess* (Tex. Sup.) 9 S. W. 879.

¹²⁹ *Furenes v. Mickelson*, 86 Iowa, 508, 53 N. W. 416; *Bennett v. Hibbert*, 88 Iowa, 154, 55 N. W. 93.

¹³⁰ *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, and cases there cited. See *Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac's Lessee*, 2 Wheat. 259.

and transmission of property.¹³¹ Doubtless, in all of the states, aliens may acquire, hold, and dispose of personal property, and make and enforce contracts relating to personal property, to the same extent as citizens.¹³²

Alien Enemies.

An alien enemy is one who is a subject of some government with which the United States is at war. Though he may reside in the United States, yet, by reason of his owing allegiance to the hostile state, he becomes impressed with the character of an enemy. And, as a general rule, he cannot, during the continuance of hostilities, make any fresh contract, or enforce any existing contract.¹³³ If he is sued on his contract, however, he may defend.¹³⁴ In New York it has been held that, to defeat a suit by a resident subject of a foreign hostile power, it must appear that he is adhering to the enemy; that aliens resident in the United States at the time of war breaking out between their country and the United States, or who come to reside in the United States after the breaking out of war, under an express permission, or permission implied from their being allowed to remain, may sue and be sued as in time of peace, since a license and protection will be implied from their being allowed to remain.¹³⁵

Whether a pre-existing contract is dissolved by the war depends upon whether it is essentially antagonistic to the laws governing a state of war. If it is of a continuing nature, like a contract of partnership, or of an executory character merely, and in the performance of its essential features would violate such laws, it is dissolved; but if not, and rights have become vested under it, the contract will either be qualified, or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such

¹³¹ See *State v. Smith*, 70 Cal. 153, 12 Pac. 121; *Nicrosi v. Phillippi*, 91 Ala. 299, 8 South. 561.

¹³² See *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Franco-Texan Land Co. v. Chaptive* (Tex. Sup.) 3 S. W. 31.

¹³³ *Scholesfield v. Eichelberger*, 7 Pet. 586; *The Rapid*, 8 Cranch, 155; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444; *Wright v. Graham*, 4 W. Va. 420; *Masterson v. Howard*, 18 Wall. 99; *Philips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *Brooke v. Filer*, 35 Ind. 402; *Blackwell v. Willard*, 65 N. C. 555; *Semmes v. Insurance Co.*, 36 Conn. 543.

¹³⁴ *Dorsey v. Thompson*, 37 Md. 25; *McVeigh v. U. S.*, 11 Wall. 259; *Mixer v. Sibley*, 53 Ill. 61; *McNair v. Toler*, 21 Minn. 175.

¹³⁵ *Clarke v. Morey*, 10 Johns. (N. Y.) 69.

rights. The tendency of adjudication is to preserve, and not to destroy, contracts existing before the war.¹³⁶

Naturalization.

An alien may cease to be such, and become a citizen by naturalization in compliance with our laws. The constitution of the United States provides that "congress shall have power to establish an uniform rule of naturalization."¹³⁷ This grant of power is exclusive, and deprives a state of the power to enact laws on the subject.¹³⁸ But, so far as a state alone is concerned, it may pass laws entitling an unnaturalized alien to all the rights which the constitution and laws of the state attach to the character of a citizen.¹³⁹ Under this grant, congress has enacted naturalization laws, by which aliens may be admitted to citizenship.¹⁴⁰

When an alien is naturalized under the laws of the United States, he becomes not only a citizen of the United States, but also a citizen of the state in which he resides. Under the fourteenth amendment of the constitution, which overrides state laws, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."

Naturalization has a retroactive effect, and removes the effect of the party's alienage, so as to confirm his title to land acquired prior thereto, and to waive all liability to forfeiture by the state.¹⁴¹ But it cannot remove his disability to inherit retroactively, for the capacity to take by descent must exist at the time the descent happens.¹⁴²

¹³⁶ Clark, Cont. 218. See *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Semmes v. Insurance Co.*, 36 Conn. 543; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Cohen v. Insurance Co.*, 50 N. Y. 610; *University v. Finch*, 18 Wall. 106; *Whelan v. Cook*, 29 Md. 1; *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Thompson*, 37 Md. 25.

¹³⁷ Article 1, § 8, cl. 4.

¹³⁸ *Chirac v. Chirac's Lessee*, 2 Wheat. 259; *Thurlow v. Massachusetts*, 5 How. 585.

¹³⁹ Per Taney, C. J., in *Dred Scott v. Sandford*, 19 How. 393.

¹⁴⁰ Rev. St. §§ 2165-2174.

¹⁴¹ *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399.

¹⁴² *People v. Conklin*, 2 Hill (N. Y.) 67. "Naturalization," it was said in this case, "though it may confirm a defective title, will not confer an estate"

PART V.

MASTER AND SERVANT.

CHAPTER XVI.

MASTER AND SERVANT.

- 248-250. The Relation Defined.
- 251-252. Creation of the Relation.
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- 269. Rights of Master against Third Persons.
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THE RELATION DEFINED.

248. Servants may be classified as—

- (a) Apprentices and
- (b) Hired servants.

249. An apprentice is a person, usually a minor, bound to a master to learn an art or trade, and to serve him during the time of his apprenticeship.

250. The relation of master and servant, other than apprentices, depends entirely upon agreement between the parties, express or implied. It exists where one person enters into the service of another, and devotes to him his personal labor.

The relation of master and servant has from a very early period been classed with that of husband and wife, parent and child, and guardian and ward, as one of the domestic relations; and it is still so treated in modern text-books, and in some of the modern codes. This classification is accurate enough when applied to slaves, apprentices, and domestic servants, but it is not accurate when applied to other servants, like clerks in stores and offices, laborers, employés of railroad companies, and many other employés who

are subject to the law governing the relation of master and servant. Accuracy in classification, however, must, in this as in many other cases, yield to usage, and the law applicable to all kinds of servants will be considered.

Blackstone, after referring to slavery, and showing that it cannot exist in England, divides servants into (1) menial servants, so called from being intra mœnia, or domestics, who are generally hired by the year; (2) apprentices, who are usually bound for a term of years, by deed indented or indentures, to serve their masters, and to be maintained and instructed by them; (3) laborers, who are only hired by the day or the week, and do not live intra mœnia, as part of the family; and (4) stewards, factors, and bailiffs, who are employed rather in a superior and ministerial capacity, and whom the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property.¹ Reeve divides servants into (1) slaves, (2) apprentices, (3) menial servants, (4) day laborers, and (5) agents of any kind.² Kent divides them into (1) slaves, (2) hired servants, and (3) apprentices.³ This is the best classification, as hired servants include all the other kinds mentioned by Blackstone and Reeve, except slaves and apprentices. Under the constitution of the United States, slavery can no longer exist in this country,⁴ and it is therefore unnecessary to consider that class. There remain, then, to be considered apprentices and hired servants.

Apprentices.

Apprentices are persons, generally infants, bound to a master for a term of years to learn some art or trade, and to serve the master and be maintained by him during the term of the apprenticeship. It has been said that at common law an apprentice, to be holden, must be bound by deed;⁵ but this is doubtful, and there

¹ 1 Bl. Comm. 425-427.

² Reeve, Dom. Rel. (4th Ed.) 413.

³ 1 Kent, Comm. 247.

⁴ Amend. art. 13, of the federal constitution. declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

⁵ Reeve, Dom. Rel. (4th Ed.) 420.

are cases which hold that a writing not under seal is sufficient.⁶ At common law, indentures of apprenticeship are executed by the father or guardian of the minor and the master. The former are bound that the apprentice shall render the services contracted for; and the master is bound to teach the art or trade agreed upon, and do whatever else he may have bound himself to do. For a breach by either party, the other may maintain an action for damages. At common law the minor need not join in the indenture; and by the better opinion, even were he to do so, he would not be bound. For a breach on his part, the remedy is against the parent.⁷ The common law in relation to apprenticeship is no longer of much importance, for the subject is almost entirely regulated by statute both in England and in this country. There are statutes in most states, if not in all, providing for the binding out of apprentices by contract between the parent or guardian and the master. And in most states, if not in all, there are statutes providing for the binding out of poor persons by the overseers of the poor or other public officers. The master has a right to the services of his apprentice, and to all wages earned by the apprentice from others;⁸ but he cannot assign the services of the apprentice to another.⁹ The right to the services of the apprentice gives the master, as in the case of other servants, a right of action against any person who entices the apprentice away from him, or knowingly harbors him if he has left without cause.¹⁰ It also gives him a right of action against any one who wrongfully injures the apprentice, and thereby causes a loss of his services.¹¹

Hired Servants.

The relation of master and servant, other than master and apprentice, depends upon a contract of hiring, express or implied, between the parties. The servant agrees with the master to render certain services, and the master agrees to pay therefor. Or the service may be gratuitous. "A servant is one who is employed to

⁶ *Cromble v. McGrath*, 139 Mass. 550, 2 N. E. 100.

⁷ See *Reeve*, Dom. Rel. (4th Ed.) 420-423, and American notes.

⁸ *Reeve*, Dom. Rel. (4th Ed.) 423.

⁹ *Reeve*, Dom. Rel. (4th Ed.) 425, 426, and notes.

¹⁰ *Post*, p. 499.

¹¹ *Post*, p. 499.

render personal services to his employer, otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the latter, who is called his 'master.'"¹² The term "servant" includes, not only menial and domestic servants, but all other employes who are hired or who volunteer to perform services for their employer, and who remain under his direction and control during the time for which they are hired. Thus, it includes a bookkeeper or clerk in a business office, a salesman in a shop, railroad employes, workmen in factories, etc. All such employes are subject to the law governing the relation of master and servant.

CREATION OF THE RELATION.

251. The relation of master and servant, except in the case of apprenticeship, is generally created by a contract of hiring between the parties. This contract is governed by the principles of law which apply to contracts generally.

(a) The contract may be either

(1) Express, as where it is evidenced by written or spoken words, or

(2) Implied, as where it is evidenced by conduct.

(b) To be binding as between the parties, there must be a consideration.

(c) The contract is subject to the general rules in regard to the capacity of parties to contract.

(d) And it is subject to the general rules concerning mistake, fraud, etc.

(e) The object of the agreement must not be unlawful.

(f) Under the statute of frauds, a contract of hiring that cannot be performed within a year must be in writing.

252. If a person enters the service of another at the other's request, the relation of master and servant exists

¹² Civ. Code Cal. § 2009.

for the time being, though the services are intended to be gratuitous; but in such a case there is no right to wages.

The relation of master and apprentice has already been explained. To constitute the relation of master and servant in other cases, a contract or agreement between them, express or implied, is essential. The relation can only arise upon an agreement between the parties. A man cannot compel another to labor for him; nor, on the other hand, can a person perform services for another without his consent, and compel him to pay for them.¹³ So, it has been held that if a servant of one man engages in temporary work for another, on the false representation of the latter that his master has directed him to do so, he does not thereby become a servant of the other, so as to be held to assume the risk of negligence on the part of the other servants of such person.¹⁴ A person may be a servant of another though his services are merely gratuitous. If a person engages in the service of another at the latter's express or implied request, though only for a temporary purpose, and with the understanding that he is to receive no compensation, he will not be entitled to wages, but the relation of master and servant will exist, for other purposes. For instance, he will be entitled to recover like any other employé for personal injuries caused by the master's negligence;¹⁵ and he will become a fellow servant of other employés so as to assume the risk of their negligence;¹⁶ and the master will be liable to third persons for his negligence or wrongful acts in the course of the employment.¹⁷

Implied Contract.

The contract need not be express,—that is, it need not be evidenced by written or spoken words; but, like other contracts, it may be implied from the conduct of the parties. Thus, if a man labors for another, at the other's request, or with the other's knowledge and ac-

¹³ Clark, Cont. 30; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Taylor v. Laird*, Law J. 25 Exch. 329; *Caldwell v. Eneas*, 2 Mill (S. C.) 348.

¹⁴ *Kelly v. Johnson*, 128 Mass. 530.

¹⁵ *Johnson v. Water Co.*, 71 Wis. 553, 37 N. W. 823.

¹⁶ Post, p. 491.

¹⁷ Post, p. 507.

quiescence, and under such circumstances that the other ought reasonably to know that compensation is expected, the law will imply a contract, and compensation may be recovered.¹⁸ The contract in such cases is implied as a matter of fact, and there must be nothing to show that no contract was intended.¹⁹ If services are performed for another without his knowledge, no contract will be implied.²⁰ If the parties stand in a family or quasi family relation towards each other, and the services consist in household or other family duties performed by one for the other, the presumption is that no compensation was intended; and, in order to recover therefor, a contract must be shown affirmatively.²¹ The presumption in such cases may

¹⁸ Clark, Cont. 25; Day v. Caton, 119 Mass. 513; Huck v. Flentye, 80 Ill. 258; Tucker v. Preston, 60 Vt. 473, 11 Atl. 726; McMillan v. Page, 71 Wis. 655, 38 N. W. 173; Jincey v. Winfield's Adm'r, 9 Grat. (Va.) 708; Curry v. Curry, 114 Pa. St. 367, 7 Atl. 61.

¹⁹ See note to Orr v. Brown, 16 C. C. A. 201; Cicotte v. Catholic Church, 60 Mich. 552, 27 N. W. 682; Gross v. Cadwell, 4 Wash. 670, 30 Pac. 1052. Thus, it has been held that where parties are in the habit of mutually receiving and rendering services, with no present thought of charging or paying therefor, no recovery can be had by either for services rendered, unless a special contract is shown, or there are circumstances which rebut the inference arising from their course of conduct that the services were intended to be gratuitous. Gross v. Cadwell, supra. See, also, Potter v. Carpenter, 76 N. Y. 157; Dunlap v. Allen, 90 Ill. 108; Covell v. Turner, 74 Mich. 408, 41 N. W. 1091. In Rayson v. Lumber Co., 26 S. C. 610, 2 S. E. 119, the plaintiff, who was already employed by defendant, demanded an increase of wages to commence January 1, 1885, and gave due notice to defendant's agent that he would leave unless such increase was made. The agent did not assent, but said that he would give an answer in two or three days. He failed to give any answer for several months, and allowed plaintiff in the meanwhile to continue at work. Then plaintiff was told that his salary would be increased as demanded, but to commence May 1, 1885. It was held that the silence of the agent did not raise any implication of assent on the part of the defendant to an increase of salary from January 1st, since the services, in the absence of an express new contract, would be referred to the existing contract.

²⁰ Taylor v. Laird, Law J. 25 Exch. 329; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; Willis v. Railway Co., 72 Mich. 160, 40 N. W. 205.

²¹ Clark, Cont. 28, and cases there cited; note to Orr v. Brown, 16 C. C. A. 202, collecting cases; Ulrich v. Arnold, 120 Pa. St. 170, 13 Atl. 831; Heffron v. Brown, 155 Ill. 322, 40 N. E. 583; Dunlap v. Allen, 90 Ill. 108; Harris v. Smith, 79 Mich. 54, 44 N. W. 169. This principle is clearly applicable where

be rebutted, however, not only by showing an express contract, but also by showing circumstances and conduct from which it may be inferred that there was an agreement for compensation.²²

If, after expiration of a contract of hiring for a specified period, the servant continues in the master's service with his consent or acquiescence, without any further express agreement, a new contract of hiring, on the same terms and for the same period as the former one, will be implied, unless there are special circumstances showing a contrary intention. The new implied contract will not be held a hiring at will.²³ Nor will it be construed as a hiring for a different compensation.²⁴

the parties occupy the relation of parent and child. See *Ulrich v. Arnold*, supra; *Bantz v. Bantz*, 52 Md. 693; *Cowan v. Musgrave*, 73 Iowa, 384, 35 N. W. 496; *Howe v. North*, 69 Mich. 272, 37 N. W. 213; *Allen v. Allen*, 60 Mich. 635, 27 N. W. 702; *Bostwick v. Bostwick's Estate*, 71 Wis. 273, 37 N. W. 405; *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. 61. The same presumption arises where one of the parties stands in loco parentis to the other. *Harris v. Smith*, 79 Mich. 54, 44 N. W. 169; *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. 453; *Ormsby v. Rhoades*, 59 Vt. 505, 10 Atl. 722; *Barhite's Appeal*, 126 Pa. St. 404, 17 Atl. 617. And it arises where the parties are but distantly related, or not related at all, but the connection between them is of a household or family nature. *Feiertag v. Feiertag*, 73 Mich. 297, 41 N. W. 414; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Cone v. Cross*, 72 Md. 102, 19 Atl. 391; *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545; *Gerz v. Weber*, 151 Pa. St. 396, 25 Atl. 82; *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114; *Covel v. Turner*, 74 Mich. 408, 41 N. W. 1091.

²² See *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *McMillan v. Page*, 71 Wis. 655, 38 N. W. 173; *Guild v. Guild*, 15 Pick. (Mass.) 129.

²³ *Wood, Mast. & Serv.* § 96; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Beeston v. Collyer*, 4 Bing. 309; *Wallace v. Floyd*, 29 Pa. St. 184; *Nicholson v. Patchin*, 5 Cal. 474; *Huntingdon v. Claffin*, 38 N. Y. 182; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491; *Lalande v. Aldrich*, 41 La. Ann. 307, 6 South. 28; *Grover & Baker Sewing-Mach. Co. v. Bulkley*, 48 Ill. 189; *Sines v. Superintendents of Poor*, 58 Mich. 503, 25 N. W. 485; *Adams v. Fitzpatrick* (Super. N. Y.) 5 N. Y. Supp. 181; *Hodge v. Newton*, 14 Daly (N. Y.) 372; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Lister's Agricultural Chemical Works v. Pender*, 74 Md. 15, 21 Atl. 686.

²⁴ *Weise v. Supervisors*, 51 Wis. 564, 8 N. W. 295; *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026; *Thompson v. Copper Co.*, 80 Mich. 422, 45 N. W. 189; *Douglass v. Insurance Co.*, 118 N. Y. 484, 23 N. E. 806. This presumption is one of fact, and the circumstances may show that a different

Validity of the Contract—Mutual Assent—Consideration—Capacity of Parties—Reality of Consent—Illegality.

The contract of hiring is governed by all the principles of law which apply to other contracts. In the first place, there must be mutual assent, or offer and acceptance. As has just been seen, however, mutual assent may be implied from the conduct of the parties.²⁵

There must also be a valid consideration. The promise of one party to serve, and the promise of the other to permit him to do so, and to pay him, are each a sufficient consideration for the other, for a promise is a sufficient consideration for a promise.²⁶ The promises must be mutually binding, however; for, if there is no mutuality, a contract of hiring is as void as any other contract would be.²⁷

The principles of law in regard to the capacity of the parties to a contract apply with full force to a contract of hiring.²⁸ A contract of hiring by an infant does not bind him, but is voidable at his option. He may at any time repudiate the contract, and recover on the quantum meruit for the services rendered. The adult is bound if the infant chooses to hold him.²⁹

The contract of hiring is affected, like other contracts, by fraud, duress, and mistake,³⁰ and, like other contracts, it must not be illegal. For instance, a contract to serve another in a business which is unlawful, as in selling intoxicating liquors in violation of law, or in conducting a gambling house or lottery or bawdy house, could not be

compensation must have been intended. See *Hale v. Sheehan*, 41 Neb. 102, 59 N. W. 554. "If the nature of the service required to be performed be not different from that which the parties had in contemplation when the original contract was entered into, the fact that the service rendered after the original contract had expired was at a different place, or may have been of a slightly different character, will not destroy this presumption, if it can be said that such service was a continuation of the original service, and within the scope generally of the original employment." *Ingalls v. Allen*, supra. If, however, the nature of the services is entirely different, the presumption may not arise. *Ingalls v. Allen*, supra; *Ewing v. Janson*, 57 Ark. 237, 21 S. W. 430.

²⁵ Ante, p. 455. See, as to offer and acceptance, *Clark*, Cont. 21 et seq.

²⁶ *Clark*, Cont. 165.

²⁷ *Clark*, Cont. 168-171.

²⁸ *Clark*, Cont. 210 et seq.

²⁹ *Clark*, Cont. 221 et seq.; *Derocher v. Continental Mills*, 58 Me. 217.

³⁰ See *Clark*, Cont. 288 et seq.

enforced,³¹ unless the servant were ignorant of the purpose or object rendering the agreement unlawful. In the latter case he could recover for services rendered.³²

Necessity for Written Contract—Statute of Frauds.

Unless writing is required by some statute, a contract may be either in writing or oral, or, as we have seen, it may be implied from conduct. Under the statute of frauds, a contract not to be performed within a year must be in writing, or no action can be maintained upon it.³³ This applies, of course, to contracts of hiring. A contract for a year's service, to commence on a future day, is within the statute;³⁴ and so is a contract to begin as soon as the employé can, and actually beginning a week after the agreement.³⁵ If the service is for a year, and it is agreed that it is to commence at once, or if no time for commencement of the service is named, in which case it is to commence at once, the contract is not within the statute.³⁶ It has been held that a contract for a year's service, to commence the day after the agreement is made, is within the statute, for the law does not regard fractions of a day;³⁷ but there are decisions to the contrary.³⁸ If the agreement may be performed within the year, it is not within the statute.³⁹ If services are performed under a con-

³¹ See Clark, Cont. 374; Spurgeon v. McElwain, 6 Ohio, 442; Sullivan v. Morgan, 17 R. I. 109, 20 Atl. 232; Bierbauer v. Wirth, 5 Fed. 336; The Pioneer, 1 Deady, 72, Fed. Cas. No. 11,177.

³² Clark, Cont. 475; Emery v. Kempton, 2 Gray (Mass.) 257; Roys v. Johnson, 7 Gray (Mass.) 162.

³³ Clark, Cont. 109.

³⁴ Snelling v. Lord Huntingfield, 1 Crompt. M. & R. 19; Bracegirdle v. Heald, 1 Barn. & Ald. 723; Sutcliffe v. Atlantic Mills, 13 R. I. 480; Kleeman v. Collins, 9 Bush (Ky.) 460; Nones v. Homer, 2 Hilt. (N. Y.) 116; Broadwell v. Getman, 2 Denio (N. Y.) 87; Comes v. Lamson, 16 Conn. 246; Sharp v. Rhiel, 55 Mo. 97; Hearne v. Chadbourne, 65 Me. 302.

³⁵ Sutcliffe v. Atlantic Mills, *supra*.

³⁶ Russell v. Slade, 12 Conn. 455.

³⁷ Dickson v. Frisbee, 52 Ala. 165; Cawthorne v. Cordrey, 13 C. B. (N. S.) 406.

³⁸ Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660.

³⁹ Clark, Cont. 109-111. As an agreement to work for a company "for five years, or so long as A. shall continue to be agent for the company," Roberts v. Rockbottom Co., 7 Metc. (Mass.) 47; or an agreement to employ

tract within the statute, there may be a recovery on the quantum meruit.⁴⁰

TERMINATION OF THE RELATION.

253. A contract of hiring is discharged or terminated like any other contract. It may be discharged, for instance—

(a) By agreement. And this may be—

(1) By waiver, cancellation, or rescission.

(2) By substituted agreement.

(3) By the happening of conditions subsequent in accordance with the express or implied terms of the contract.

(b) By performance.

(c) By breach.

(d) By impossibility of performance under some circumstances.

254. A breach of the contract by the master entitles the servant to leave. Such a breach may be—

(a) By renouncing the contract.

(b) By rendering performance or further performance impossible.

(c) By breach of particular terms of the contract, express or implied, as by failure to pay the wages agreed, or by ill treatment of the servant.

255. A breach of the contract by the servant entitles the master to discharge him. Such a breach may be—

(a) By renunciation of the contract.

(b) By rendering performance or further performance by him impossible.

a person so long as he may be disabled from an injury which he has received. *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397.

⁴⁰ *Clark*, Cont. 111, 112, notes, and cases cited; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. 703; *Towsley v. Moore*, 30 Ohio St. 185.

- (c) By breach of particular terms of the contract, express or implied, as—
- (1) By incompetency.
 - (2) By criminal or grossly immoral conduct.
 - (3) By willful disobedience.
 - (4) By habitual neglect.

The relation of master and servant may be determined in various ways. It is determined whenever the contract of hiring is discharged, and therefore we must refer to the principles of law in regard to the discharge of contracts generally.

Discharge of Contract by Agreement.

In the first place, a contract of hiring may, like other contracts, be discharged by agreement between the parties. And this may be either (1) by subsequent agreement waiving, canceling, or rescinding the contract, or substituting a new agreement; or (2) by the happening of conditions subsequent expressed or implied in the contract.⁴¹

Same—Waiver, Cancellation, or Rescission—Substituted Agreement.

A contract of hiring may always be discharged by an agreement between the parties to it that it shall no longer be binding upon them;⁴² but this agreement is subject to the rule, which governs all other simple contracts, that there must be a consideration.⁴³ A substitution of a new contract of hiring is a waiver of the prior contract, and the rights of the parties are thereafter determined by the new contract.⁴⁴

⁴¹ See Clark, Cont. 607-627.

⁴² Therefore, if a servant hired for a specified term is discharged with his consent, he cannot complain, nor recover salary for the remainder of the term. *Southmayd v. Insurance Co.*, 47 Wis. 517, 2 N. W. 1137; *Grannemann v. Kloepper*, 24 Ill. App. 277.

⁴³ Clark, Cont. 608.

⁴⁴ Clark, Cont. 610. A contract of hiring may be thus discharged either by the making of an entirely new and independent contract, or by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. Clark, Cont. 611. There need be no express waiver of the old contract, or of some of its terms, to constitute a discharge by substituted agreement.

Same—Happening of Conditions Subsequent.

A contract of hiring, like other contracts, may contain within itself express or implied provisions for its determination under certain circumstances. Such provisions are called "conditions subsequent."

The contract may give one of the parties the right to terminate it upon the nonfulfillment of a specified term. If the term is not fulfilled, and the party terminates the contract, there is no breach, but the contract is rightfully determined.⁴⁵ If a servant is employed for a specified time to carry on the master's business, or do other work, "to the master's satisfaction," the master has a right to discharge him whenever he becomes, in good faith, dissatisfied with him.⁴⁶ Some courts hold that the master is the sole judge whether the servant is satisfactory, and that the courts cannot determine whether his dissatisfaction was reasonable.⁴⁷ A hiring to last so long as each party is satisfied is a hiring at will, and may be terminated at any time by either.⁴⁸ So the parties may introduce into their contract a provision that the occurrence of a specified event shall terminate the contract, and discharge them both from further liability under it.

A contract of hiring may contain a provision, express or implied, making it determinable at the option of one or either of the parties upon certain terms. Where the contract expressly provides that it may be terminated by either party on giving a month's no-

A new contract inconsistent with the original impliedly discharges the latter. Clark, Cont. 611, 612, and cases there collected.

⁴⁵ Clark, Cont. 622-627.

⁴⁶ Frary v. Rubber Co., 52 Minn. 264, 53 N. W. 1156; Smith v. Robson (City Ct. N. Y.) 26 N. Y. Supp. 884; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; Glyn v. Miner, 6 Misc. Rep. 637, 27 N. Y. Supp. 341; Allen v. Compress Co., 101 Ala. 574, 14 South. 362; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876. But a servant engaged for a certain time, "so long as he shall satisfactorily perform his duties," who does satisfactorily perform his duties, cannot be discharged at the master's volition merely because business is dull, and the master cannot afford to go on with the contract. Hy-decker v. Williams (Com. Pl.) 18 N. Y. Supp. 586.

⁴⁷ See the cases above cited.

⁴⁸ Evans v. Bennett, 7 Wis. 404; Booth v. Ratcliffe, 107 N. C. 6, 12 S. E. 112; Wilmington Coal Min. & Manuf'g Co. v. Lamb, 90 Ill. 465.

tice, and the servant is dismissed on a month's notice, the contract is discharged, and not broken.⁴⁹ Terms like this need not necessarily be expressed in the contract; but they may be imported into it by custom and usage.⁵⁰ A custom or usage, however, can never affect a contract if it is inconsistent with its terms.⁵¹ If the contract fixes no time during which it is to last, and no time is fixed by law or by usage, it may be determined at the will of either party at any time; the hiring being construed as a hiring at will.⁵² The circumstances may show a contrary intention, and the intention of the parties must govern, of course.⁵³ The fact that the wages are payable at specified periods does not necessarily show that the hiring was for the specified period, and not a hiring at will, nor, on the other hand, that it was not a hiring for a longer period than

⁴⁹ *Jenkins v. Long*, 8 Md. 132.

⁵⁰ *Clark, Cont.* 580-586 (where the requisites of a custom or usage are shown) *Parker v. Ibbetson*, 4 C. B. (N. S.) 347.

⁵¹ *Clark, Cont.* 586; *Baltimore Baseball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 Atl. 279; *Greenstine v. Borchard*, 50 Mich. 434, 15 N. W. 540; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. 597.

⁵² *Coffin v. Landis*, 46 Pa. St. 426; *Peacock v. Cummings*, Id. 434; *Greenburg v. Early*, 4 Misc. Rep. 99, 23 N. Y. Supp. 1009; *Attrill v. Patterson*, 58 Md. 226; *Walker v. Denison*, 86 Ill. 142; *Fawcett v. Cash*, 5 Barn. & Adol. 904; *Hathaway v. Bennett*, 10 N. Y. 108; *Evans v. Bennett*, 7 Wis. 404. A contract for a specified period, "unless sooner determined," is not a hiring at will, but is a hiring for the period named. *Niagara Fire Ins. Co. v. Whitaker*, 21 Wis. 329. An agreement to give a person "permanent" employment means nothing more than that the employment is to continue indefinitely, and until one or the other of the parties desires, for some good reason, to sever the relation. *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126.

⁵³ A. addressed a letter to B., offering him \$100 per month for his services, and stated: "If you give me satisfaction at the end of the first year, I will increase your wages accordingly." The offer was accepted by B. The court, in construing the contract, held it a hiring for one year. *Norton v. Cowell*, 65 Md. 359, 4 Atl. 408. In *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, a letter engaging an hotel manager "at \$125 per month" showed upon its face that the engagement contemplated his giving up another position, removing with his family to another place, several hundred miles away, and undertaking there, besides his duties as manager, those of secretary and treasurer of the hotel company. It was held that the letter could not be construed as an employment by the month or at will, but must be held to import an engagement by the year.

specified.⁵⁴ As we have seen, where a servant who is hired for a specified period continues to serve after expiration of the term with the master's consent, but without any new arrangement, a contract for another similar period will be implied, and not a hiring at will.⁵⁵

In every contract of hiring, certain provisions for discharge are implied. If the servant proves incompetent, or wrongfully acts in such a way as to injure the master's business, or is otherwise guilty of breach of duty, the master may rightfully discharge him. This, however, is a breach of contract by the servant discharging the master from further liability under the contract, and will therefore be considered in treating of discharge by breach.⁵⁶

Discharge of Contract by Performance.

The contract of hiring is discharged by full performance by both parties. If a person is hired for a specified time, and he works for that time, and is paid, the contract is at an end without the necessity of any notice.⁵⁷ The parties may, however, make a new

⁵⁴ Babcock & Wilcox Co. v. Moore, 62 Md. 161; McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176; Beach v. Mullin, 34 N. J. Law, 343; Tatterson v. Manufacturing Co., 106 Mass. 56; Prentiss v. Ledyard, 28 Wis. 131; Thomas v. Hatch, 53 Wis. 296, 10 N. W. 393; Haney v. Caldwell, 35 Ark. 156; Larkin v. Hecksher, 51 N. J. Law, 133, 16 Atl. 703. Payment of wages quarterly, monthly, or weekly is not inconsistent with a yearly hiring. Norton v. Cowell, 65 Md. 359, 4 Atl. 408; Tatterson v. Manufacturing Co., 106 Mass. 56. Agreement to pay at a yearly rate is not necessarily a hiring for a year. Prentiss v. Ledyard, 28 Wis. 131. But the time for payment of wages will determine the duration of the employment, if there is nothing in the case to rebut the inference arising therefrom. Thus, a hiring for a certain sum per month or per week is a hiring by the month or week, as the case may be, if nothing is said as to the length of time the service is to continue, and no other circumstances appear. Magarahan v. Wright, 83 Ga. 773, 10 S. E. 584. A contract that the servant's "salary from Nov. 1st will be per month, at the rate of \$500 a year," makes the employment by the month. Pinckney v. Talmage, 32 S. C. 364, 10 S. E. 1083.

⁵⁵ Ante, p. 457, and cases there cited. One who hires himself on a contract for a year, and afterwards continues without any new contract, is again impliedly hired by the year, and neither he nor his employer can terminate the engagement at his pleasure. McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176.

⁵⁶ Post, p. 467.

⁵⁷ Ewing v. Janson, 57 Ark. 237, 21 S. W. 430.

contract for a further term; and such a contract will be implied if the servant continues to labor, and the master acquiesces.⁵⁸ The question as to what constitutes sufficient performance is considered in treating of breach of contract. As to tender and payment, reference must be made to works on the general law of contracts.⁵⁹

Discharge of Contract by Breach.

If either party to a contract of hiring breaks through the obligations imposed by the contract, the breach always gives the other party a right of action for any damages he may have sustained; and as a rule, but not always, it discharges the other party from any further liability under the contract. We shall ascertain now what constitutes such a breach of contract by the master as entitles the servant to treat the contract as discharged, and leave the employment. We shall then ascertain what constitutes such a breach by the servant as entitles the master to discharge him.

Same—Breach by Master.

If the master renounces the contract either before the time for performance, or in the course of performance, as by wrongfully discharging the servant, the servant may treat the contract as broken and discharged, and sue at once for damages, without holding himself ready or offering to perform or further perform the contract on his part.⁶⁰ The same is true where the master, either before the time for performance or in the course of performance, does some act by which he makes performance or further performance

⁵⁸ Ante, p. 457.

⁵⁹ See Clark, Cont. 629-643.

⁶⁰ Clark, Cont. 646-648; *Hochster v. De la Tour*, 2 El. & Bl. 678; *Howard v. Daly*, 61 N. Y. 632; *Burtis v. Thompson*, 42 N. Y. 246; *Ryan v. Dayton*, 25 Conn. 188; *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708; *Hosmer v. Wilson*, 7 Mich. 294; *Jones v. Transportation Co.*, 51 Mich. 539, 16 N. W. 893; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581. Where a servant is told by his master that their relations had better be discontinued immediately, and thereupon the servant, no work being assigned to him, leaves, he is discharged. *Bennett v. Morton*, 46 Minn. 113, 48 N. W. 678. And see *Paine v. Hill*, 7 Wash. 437, 35 Pac. 136. A request by the master for the servant's resignation, which is given, is a discharge of the servant. *Jones v. Transportation Co.*, 51 Mich. 539, 16 N. W. 893. But see *Wharton v. Christie*, 53 N. J. Law, 607, 23 Atl. 258.

impossible.⁶¹ If a master wrongfully discharges his servant, he cannot, by subsequently ordering the servant to return to work, put the servant in default. After a wrongful dismissal the contract is discharged, and the servant need not return, though requested to do so.⁶²

It is a general principle of the law of contracts that renunciation of the contract by one of the parties does not discharge the other unless he choose to treat it as a discharge; that it is optional with him to treat the contract as still in force.⁶³ This principle has been applied by some of the courts to contracts of hiring, and it has been held that, where the master discharges the servant without cause, the servant need not treat the contract as at an end, but may hold himself in readiness to perform, and recover each installment of wages, as it falls due, during the period for which he was employed.⁶⁴ Other courts refuse to recognize this doctrine,—the doctrine of constructive service, as it is called,—but hold, on the contrary, that, where the master renounces the contract and dismisses the servant before the end of the term, the servant cannot go on and do the work, or hold himself in readiness to do it, and then recover the contract price as on a full performance, but that he must treat the hiring as at an end, and pursue his remedy, either on the quantum meruit, or for damages for breach of contract.⁶⁵

If the master ill treats the servant by assaulting and beating him, he breaks an implied term of the contract, and the servant may leave, and recover as upon a wrongful discharge.⁶⁶ And of course nonpayment of the wages as agreed, is a breach by the master.

⁶¹ Clark, Cont. 649; *Planché v. Colburn*, 8 Bing. 14; *W. U. Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Seipel v. Trust Co.*, 84 Pa. St. 47.

⁶² See *Mitchell v. Toale*, 25 S. C. 238.

⁶³ Clark, Cont. 645.

⁶⁴ *Gandell v. Pontigny*, 4 Camp. 375, 1 Starkie, 198; *Strauss v. Meertief*, 64 Ala. 299; *Isaacs v. Davies*, 68 Ga. 169.

⁶⁵ *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Lord v. Thomas*, 64 N. Y. 107; *Hosmer v. Wilson*, 7 Mich. 294; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756; *Collyer v. Moulton*, 9 R. I. 90; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Owen v. Frink*, 24 Cal. 178.

⁶⁶ *Ward v. Ames*, 9 Johns. (N. Y.) 138; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. 820. But see *Morgan v. Shelton*, 28 La. Ann. 822, a case in which it

Same—Breach by Servant.

If the servant willfully renounces and abandons the service without just cause, or, by his inexcusable conduct, renders further performance impossible, such a breach, if the contract is entire, will discharge the master from all liability under the contract, even for services actually rendered, since performance by the servant is a condition precedent to his right to compensation. An action for the services rendered in such a case clearly cannot be brought on the contract. Whether there can be a recovery on the quantum meruit is a different question. Such a recovery, as will be seen in a subsequent section, is allowed by some courts, but denied by others.⁶⁷ Whether or not a mere partial failure on the part of one of the parties to perform the contract discharges the other altogether from liability on the contract is a question upon which the decisions are conflicting. If there is an express and entire contract to pay a certain lump sum for the services contracted for, then, by the better opinion, the servant must perform in full in order to recover anything. If he performs in part only, he cannot recover on the quantum meruit for what he has done.⁶⁸

Breach by one of the parties of a subsidiary term in the contract does not discharge the other, but merely entitles him to damages.⁶⁹ This is a well-established principle of the general law of contract. So, if the contract is not entire, but divisible, breach as to part will not prevent recovery for performance of the remainder. It

was held that a servant who was knocked down by his master in a fit of passion was justified in leaving. This case cannot be supported. An assault on a servant or his child by one who is not connected with the master, and without any direction or authority from the master, does not entitle the servant to leave. *Mather v. Brokaw*, 43 N. J. Law, 587. Compare *Patterson v. Gage*, 23 Vt. 558.

⁶⁷ Post, p. 476.

⁶⁸ *Cutter v. Powell*, 6 Term R. 320.

⁶⁹ In *Bettini v. Gye*, 1 Q. B. Div. 183, the plaintiff, a professional singer, had entered into a contract with the defendant, director of an opera, for his services as a singer for a considerable time, and upon a number of terms, one of which was that plaintiff should be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsing. The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this breach

has been held that if services are to be paid for in installments, as where the wages are to be paid weekly or monthly on a hiring for a year, the contract will be regarded as divisible, unless such a construction is expressly excluded; and a recovery for services rendered may be had by the servant if he leaves before the end of the term.⁷⁰

There is an implied contract upon the part of a servant that he is competent to discharge the duties for which he is employed; and, if he proves incompetent, it is a breach of contract, for which he may be dismissed.⁷¹ A servant may be discharged if, by intoxication, even outside of working hours, and not on his master's premises, he unfits himself to fully and properly perform his duties.⁷² And drunkenness on the master's premises may be ground for dismissal, though it does not incapacitate the servant for the performance of his duties.⁷³

A servant may be dismissed by the master before the expiration of the term either for criminal or immoral conduct, willful disobe-

as a discharge of the contract. The court held, however, that, in the absence of any express declaration that the term was vital to the contract, it must "look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it, and may be compensated for in damages." And it was held that the term did not go to the root of the matter, so as to constitute a condition precedent. On the other hand, where a singer who had agreed to take the principal part in an opera failed to perform in the opening and early performances, it was held that the other party was discharged. *Poussard v. Spiers*, 1 Q. B. Div. 410.

⁷⁰ *Chamblee v. Baker*, 95 N. C. 98. The application of the rule to this particular contract is contrary to the decisions in many other states. See post, p. 481.

⁷¹ *Leatherberry v. Odell*, 7 Fed. 641; *Searle v. Ridley*, 28 Law T. (N. S.) 411; *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Maxelbaum v. Limberger* (Ga.) 3 S. E. 257. *Baltimore Baseball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 Atl. 279; *Woodrow v. Hawving* (Ala.) 16 South. 720.

⁷² *McCormick v. Demary*, 10 Neb. 515, 7 N. W. 283; *Ulrich v. Hower*, 156 Pa. St. 414, 27 Atl. 243; *Smith v. Railroad Co.*, 60 Minn. 330, 62 N. W. 392.

⁷³ *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 South. 315; *Dunkell v. Simons* (Com. Pl.) 7 N. Y. Supp. 655; *Speck v. Phillips*, 5 Mees. & W. 279.

dience, or habitual neglect.⁷⁴ He may be dismissed for larceny or embezzlement, either from the master or a third person;⁷⁵ and he may be dismissed for cheating or defrauding, or attempting to cheat or defraud, his master.⁷⁶ Habitual neglect of duty is always sufficient ground for discharge.⁷⁷ So if a servant handling his master's money, as a cashier, for instance, largely overdraws his salary, the master may discharge him.⁷⁸ Gross moral misconduct is always good ground for dismissal.*

Willful disobedience by a servant of the master's orders is a breach of his contract, and ground for dismissal, unless the disobedience is in a slight matter, and involves no serious consequences.⁷⁹ Even in the latter case there are authorities holding a dismissal justified,⁸⁰ but the better opinion is to the contrary.⁸¹ A dismissal has been held justified where a house servant went to see her sick mother, who was supposed to be in danger of death;⁸² but this case goes too far.⁸³ A dismissal has also been held justified where a servant refused to go on an errand without having had his dinner;⁸⁴ where a farm hand refused to go to work without

⁷⁴ 2 Kent, Comm. 258.

⁷⁵ *Libhart v. Wood*, 1 Watts & S. (Pa.) 265; *Cunningham v. Fonblanque*, 6 Car. & P. 44, 49; *Spotswood v. Barrow*, 5 Exch. 110.

⁷⁶ *Singer v. M'Cormick*, 4 Watts & S. (Pa.) 267.

⁷⁷ *Callo v. Brouncker*, 4 Car. & P. 518; *Robinson v. Hindman*, 3 Esp. 235; *Armour-Cudahy Packing Co. v. Hart*, 36 Neb. 166, 54 N. W. 262; *Elliott v. Wanamaker*, 155 Pa. St. 67, 25 Atl. 826.

⁷⁸ *Smith v. Baker*, 101 Mich. 155, 59 N. W. 394.

*As the pregnancy of a maid servant, *Connors v. Justice*, 13 Ir. Com. Law, 451; or being the father of a bastard child, *Rex v. Inhabitants of Welford*, Cald. 57; or an attempt to ravish a maid servant, *Atkin v. Acton*, 4 Car. & P. 208.

⁷⁹ *Lilley v. Elwin*, 11 Q. B. 742; *Spain v. Arnott*, 2 Starkie, 256; *Leatherberry v. Odell*, 7 Fed. 641; *Dunkell v. Simons* (Com. Pl.) 7 N. Y. Supp. 655; *Tullis v. Hassell*, 54 N. Y. Super. Ct. 391; *Matthews v. Park Bros. & Co.*, 146 Pa. St. 384, 23 Atl. 208; *Id.*, 159 Pa. St. 579, 28 Atl. 435; *Fisher v. Monroe* (City Ct. N. Y.) 17 N. Y. Supp. 837; *Hamlin v. Race*, 78 Ill. 422.

⁸⁰ *Turner v. Mason*, 14 Mees. & W. 112, 14 Law J. Exch. 311.

⁸¹ *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162; *Callo v. Brouncker*, 4 Car. & P. 518; *Park Bros. & Co. v. Bushnell*, 9 C. C. A. 138, 60 Fed. 583.

⁸² *Turner v. Mason*, *supra*.

⁸³ *Shaver v. Ingham*, *supra*.

⁸⁴ *Spain v. Arnott*, *supra*.

beer;⁸⁵ where an employé smoked in the shop, in violation of rules, and, when remonstrated with, left the shop in working hours, to finish the smoke.⁸⁶ But the contrary was held where the ground relied upon for dismissal of a teacher was the failure to return within a day or two after vacation;⁸⁷ where a factory employé absented himself for a day.⁸⁸

By the better opinion, especially in the case of mechanics, clerks in stores, and other servants not menial, the act of disobedience, to justify dismissal, must involve injury to the master. "‘Willful’ disobedience, in the sense in which the word is used in the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination. We are not prepared to hold that, even in what is known as ‘menial service,’ every act of disobedience may be lawfully punished by the penalty of dismissal, and the serious consequences which it entails upon the servant put out of place. No doubt, domestic discipline may be closer than that in business employments; but there must be a limit to the arbitrary power of masters.”⁸⁹ Unless the dismissal was clearly justifiable within these rules, the question should be left to the jury.⁹⁰

Where the disposition and deportment of the servant are such as to seriously injure the custom and business of the master, or his other interests, he may be dismissed; but slight discourtesies, hasty words, and occasional exhibitions of ill temper, are not sufficient cause for dismissal, where there are many petty causes for annoyance and irritation in the business.⁹¹

If a servant, without the consent of his master, engage in any employment or business, for himself or another, which may tend to in-

⁸⁵ *Lilley v. Elwin*, *supra*.

⁸⁶ *Forsyth v. McKinney*, 56 Hun, 1, 8 N. Y. Supp. 561.

⁸⁷ *Fillieul v. Armstrong*, 7 Adol. & E. 557. See, also, *Thrift v. Payne*, 71 Ill. 408.

⁸⁸ *Shaver v. Ingham*, *supra*. If a day’s absence involves serious consequences, it will justify dismissal. See *Ford v. Danks*, 16 La. Ann. 119.

⁸⁹ *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162.

⁹⁰ *Shaver v. Ingham*, *supra*; *Edwards v. Levy*, 2 Fost. & F. 94.

⁹¹ *Leatherberry v. Odell*, 7 Fed. 641; *Lalande v. Aldrich*, 41 La. Ann. 307, 6 South. 28.

jure his master's trade or business, this is ground for his dismissal. "This is so because it is the duty of the servant, not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests. But, when the servant engages in a business which brings him in direct competition with his master, the tendency is to injure or endanger, not to protect and promote, the interests of the latter."⁹²

The master may condone or waive a breach of contract by the servant; and, if he does so, he cannot afterwards rely upon it as a discharge, either to justify a dismissal of the servant, or to defeat an action for wages.⁹³ Retention of the servant after knowledge of misconduct or a breach of contract on his part is *prima facie* a waiver;⁹⁴ but the master may show circumstances excusing his delay.⁹⁵

If there is sufficient ground for dismissing a servant, the motive of the master in taking advantage of it is altogether immaterial.⁹⁶ Any adequate cause for dismissal known to the master at the time of dismissal will justify him, whether such cause was assigned or not, and even though a different cause may have been assigned.⁹⁷ It has even been held, and very properly, that good and sufficient reasons for dismissal, existing at the time of dismissal, will justify him, though he did not even know of them until afterwards.⁹⁸

⁹² *Dieringer v. Meyer*, 42 Wis. 311; *Thompson v. Havelock*, 1 Camp. 527. Cf. *Chaddock College v. Bretherick*, 36 Ill. App. 621. The fact that the servant in such a case continues to give his whole time and attention to his master's business is immaterial. *Dieringer v. Meyer*, *supra*.

⁹³ *Bast v. Byrne*, 51 Wis. 531, 8 N. W. 494; *Prentiss v. Ledyard*, 28 Wis. 131; *McGrath v. Bell*, 33 N. Y. Super. Ct. 195; *Leatherberry v. Odell*, 7 Fed. 641; *Jonas v. Field*, 83 Ala. 445, 3 South. 893.

⁹⁴ Cases above cited.

⁹⁵ *Jonas v. Field*, 83 Ala. 445, 3 South. 893; *McMurray v. Boyd*, 58 Ark. 504, 25 S. W. 505.

⁹⁶ *Jackson v. Hospital*, 6 Misc. Rep. 101; 26 N. Y. Supp. 27.

⁹⁷ *Sterling Emery Wheel Co. v. Magee*, 40 Ill. App. 340; *Ball v. Mining Co.*, 8 Misc. Rep. 333, 28 N. Y. Supp. 537; *Odeneal v. Henry*, 70 Miss. 172, 12 South. 154; *Baillie v. Kell*, 4 Bing. N. C. 638; *Ridgway v. Market Co.*, 3 Adol. & E. 171. But see *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162; *Cussons v. Skinner*, 11 Mees. & W. 161; *Smith v. Allen*, 3 Fost. & F. 157.

⁹⁸ *Odeneal v. Henry*, *supra*; *Willets v. Green*, 3 Car. & K. 59; *Spotswood v. Barrow*, 5 Exch. 110. But see *Cussons v. Skinner*, *supra*. In *Willets v. Green*, *supra*, *Alderson, B.*, said: "If an employer discharge his

Discharge of Contract by Impossibility of Performance.

Impossibility of performance arising subsequent to the formation of the contract does not discharge either party from his obligation, even though he may not be at all in fault,⁹⁹ except (1) where the impossibility arises from a change in the law,¹⁰⁰ or from the action of a court, as by injunction, where the party claiming to be discharged thereby is not in fault;¹⁰¹ or (2), in some states, where the object on which the services are to be performed is destroyed without fault on the part of either party;¹⁰² or (3) where either one of the parties dies,¹⁰³ or the servant is permanently incapacitated by illness or per-

servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of the existence of the cause. This point has been much discussed in the house of lords and elsewhere, but what I have stated is the result."

⁹⁹ See Clark, Cont. 678 et seq.; *Leopold v. Salkey*, 89 Ill. 412. A servant is not discharged from liability to perform his contract by the fact that he is arrested, even without his fault, and confined in jail. In such a case the master may rescind. *Leopold v. Salkey*, supra. Where performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is not discharged. It was therefore held by the supreme court of Wisconsin that where the plaintiff agreed that he and his wife should work for the defendant for a year, and four months afterwards the wife, being about to give birth to a child, left, and the plaintiff was thereupon discharged, the plaintiff could not recover for his wages on the quantum meruit, as he should have foreseen and provided for his wife's sickness when he made the contract, and therefore his nonperformance was not excused. *Jennings v. Lyons*, 39 Wis. 553.

¹⁰⁰ Clark, Cont. 681. See *Cordes v. Miller*, 39 Mich. 581; *Jones v. Judd*, 4 N. Y. 411. As where the object for which the services are engaged are prohibited by statute. *Cordes v. Miller*, supra. There is no discharge if the change in the law merely makes performance more burdensome. *Baker v. Johnson*, 42 N. Y. 126.

¹⁰¹ *People v. Insurance Co.*, 91 N. Y. 174.

¹⁰² *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667; *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. 436. But see *Brumby v. Smith*, 3 Ala. 123.

¹⁰³ Clark, Cont. 683, collecting cases. The death of the master discharges the contract. *Yerrington v. Greene*, 7 R. I. 589; *Lacy v. Getman*, 119 N. Y. 100, 23 N. E. 452; *Farrow v. Wilson*, L. R. 4 C. P. 744. But it has been held by some courts that the death of one only of two joint employers, as

sonal injury,¹⁰⁴ or where the prevalence of a contagious and fatal disease in the vicinity of the place where the servant is to work renders it unsafe for him to remain there.¹⁰⁵ As heretofore stated, impossibility cannot be relied upon as a discharge if it was created by the party himself; but such impossibility will operate as a discharge of the other party.¹⁰⁶ The fact that the master becomes insolvent, and is obliged to cease business, does not discharge him from his obligation to pay the servant's wages for the full term, or to pay damages for refusal to carry out the contract.¹⁰⁷

REMEDIES FOR BREACH OF CONTRACT—DAMAGES.

256. A breach of the contract of hiring by the servant gives the master a right of action for any damages he may have sustained.

257. Upon a breach of the contract by the master by wrongfully discharging the servant, the servant has the following remedies:

of a partner, does not terminate the hiring. *Martin v. Hunt*, 1 Allen (Mass.) 419; *Fereira v. Sayres*, 5 Watts & S. (Pa.) 210. The better opinion, however, is to the contrary. *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062; *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095; *Tasker v. Shepherd*, 6 Hurl. & N. 575. The death of the servant discharges the contract. *Wolfe v. Howes*, 20 N. Y. 197.

¹⁰⁴ The authorities all agree that the incapacitating sickness of the servant, or incapacitating personal injuries, will operate as a discharge of the contract if permanent, or, if temporary, excuse nonperformance or delay in performance on the part of the servant. *Robinson v. Davison*, L. R. 6 Exch. 269; *Wolfe v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40; *Harrington v. Iron-Works Co.*, 119 Mass. 82; *Fuller v. Brown*, 11 Metc. (Mass.) 440; *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Green v. Gilbert*, 21 Wis. 395. Temporary sickness is no ground for dismissal unless the nature of the contract is such that a temporary illness makes it necessary to employ another servant. See *Cuckson v. Stones*, 28 Law J. Q. B. 25, 5 Jur. (N. S.) 337, 1 El. & El. 248; *Eversley*, Dom. Rel. 929.

¹⁰⁵ *Lakeman v. Pollard*, 43 Me. 463. But see *Dewey v. School Dist.*, 43 Mich. 480, 5 N. W. 646.

¹⁰⁶ Ante, p. 465.

¹⁰⁷ *Vanuxem v. Bostwick* (Pa. Sup.) 7 Atl. 598

- (a) He may bring an action on the contract of hiring, and recover whatever damages he may have sustained; the measure of his damages being the amount already earned and unpaid, and whatever he would have earned during the remainder of the term, less any sums actually earned in other employment, or which he might have earned by the exercise of reasonable diligence in seeking similar employment.
- (b) Or he may treat the contract as rescinded, and recover on the quantum meruit for services actually rendered.
- (c) Either of these actions is a bar to the other.
- (d) A few courts allow him to treat the contract as still in force, and recover wages as they fall due, upon the theory of constructive service; but in most states this doctrine is repudiated.

If the servant breaks his contract by renouncing it before the time for performance has arrived, or by abandoning the service after a part performance, or by otherwise failing to perform it according to its terms, the remedy of the master is by action of special assumpsit to recover damages for the breach; or he may set up such damages if sued by the servant for services rendered.

If the master renounces the contract before the time for performance, and therefore before any services are rendered, the only remedy of the servant, by the better opinion, is an action of special assumpsit to recover damages for the breach. Some courts, as we shall presently see, permit him to treat the contract as still in force, and to recover the wages, on the theory of constructive service, when they fall due under the contract.¹⁰⁸

If the master breaks the contract in the course of performance, either by discharging the servant without cause, or by giving the servant cause to leave and refuse further performance, the servant has an election of remedies:

First. He may bring special assumpsit against the master for his

¹⁰⁸ Post, p. 476, and cases there cited.

breach of the contract; and this remedy he may pursue whether his wages are paid up to the time of his discharge or not. And he may either bring this action immediately, or he may wait until the period for which he was hired has expired. In such an action he will be entitled to recover the wages, if any, earned up to the time of the discharge, and, in addition, the actual damages he has sustained by the master's breach of the contract. In case he has, by the exercise of due diligence, been unable to secure other employment during the entire term, he can recover the entire wages. He cannot remain idle during the term for which he was hired, but must seek for other employment. The measure of his damages, therefore, is the wages he would have earned under the contract, less any amount he has actually earned in other employment, or which he might have earned by the exercise of proper diligence in seeking employment in the same line of business.¹⁰⁹

¹⁰⁹ See *Wood, Mast. & Serv.* 249; *Elderton v. Emmens*, 6 C. B. 160; *Goodman v. Pocock*, 15 Q. B. 576; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162, 179; *Howard v. Daly*, 61 N. Y. 362; *Willoughby v. Thomas*, 24 Grat. (Va.) 522; *Leatherberry v. Odell*, 7 Fed. 641; *Fuller v. Little*, 61 Ill. 21; *Mahon v. Daly*, 70 Ill. 653; *Dana v. Short*, 81 Ill. 468; *Litchenstein v. Brooks*, 75 Tex. 196, 12 S. W. 975; *Bennett v. Morton*, 46 Minn. 113, 48 N. W. 678; *Allen v. Maronne*, 93 Tenn. 161, 23 S. W. 113. That the servant must use reasonable diligence in seeking other employment, and that the amount earned, or which should have been earned, in other employment, will be deducted from his claim, see *Howard v. Daly*, 61 N. Y. 362; *Leatherberry v. Odell*, 7 Fed. 641; *Fuller v. Little*, 61 Ill. 21; *Champlain v. Stamping Co.*, 68 Mich. 238, 36 N. W. 57; *Stevens v. Crane*, 37 Mo. App. 487; *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 South. 712. He is only bound to use reasonable diligence in seeking other employment, and is only required to seek employment in the same or a similar line of business, in the same grade, and in the same place. *Leatherberry v. Odell*, 7 Fed. 641; *Strauss v. Meertief*, 64 Ala. 299; *Fuchs v. Koerner*, 107 N. Y. 529, 14 N. E. 445; *Costigan v. Railroad Co.*, 2 Denio (N. Y.) 609; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271; *Simon v. Allen*, 76 Tex. 398, 13 S. W. 296. The burden of proving that other employment could have been obtained by the exercise of reasonable diligence is on the master. *Costigan v. Railroad Co.*, 2 Denio (N. Y.) 609; *Howard v. Daly*, 61 N. Y. 362; *Leatherberry v. Odell*, 7 Fed. 641; *City of Jacksonville v. Allen*, 25 Ill. App. 54; *Brown v. Board of Education*, 29 Ill. App. 572; *Odenial v. Henry*, 70 Miss. 172, 12 South. 154; *Allen v. Whitlark*, 99 Mich. 492, 58 N. W. 470; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113. As to the effect of intoxica-

Second. If the servant's wages are not paid up to the time of his discharge, he may treat the contract of hiring as rescinded, and maintain general assumpsit on the quantum meruit, to recover for the services he has actually rendered. He recovers in such an action what the services were reasonably worth, and is not bound by the rate of compensation fixed by the contract. He can only recover in this form of action for services actually rendered.¹¹⁰

The servant must elect between these actions. He cannot maintain both. If he elects to sue upon the quantum meruit, he treats the contract as rescinded, and he cannot afterwards treat it as binding, in order to maintain special assumpsit on it for damages for its breach. And so, conversely, if he brings special assumpsit, he treats the contract as binding, and he cannot afterwards treat it as rescinded for the purpose of suing on the quantum meruit. And one action for breach of the contract is a bar to any further action.¹¹¹

Third. It was at one time held in England that, where a servant is wrongfully discharged, he may, if he chooses, treat the contract of hiring as continuing, notwithstanding the master's breach, and if he holds himself in readiness to perform the contract on his part, and is able and willing to do so, recover his wages for the whole term, upon the ground of constructive service; either by one action after the expiration of the term, or by a separate action for each installment of wages as it falls due by the terms of the contract; and this doctrine has been recognized and applied by some of our courts.¹¹² In England, however, and in most of our states, the doctrine of constructive service has been repudiated; and it is held that, where a servant is wrongfully discharged, the relation ceases to exist, and that only one action can be maintained against the master, which must be either special assumpsit for breach of

tion of the servant after dismissal, and when he should have been seeking other employment, see *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271.

¹¹⁰ See *Ryan v. Dayton*, 25 Conn. 188; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704; *Rogers v. Parham*, 8 Ga. 190; *Rye v. Stubbs*, 1 Hill (S. C.) 384; *Clark v. Manchester*, 51 N. H. 594; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581.

¹¹¹ *Keedy v. Long*, 71 Md. 385, 18 Atl. 704. And see *Booge v. Railroad Co.*, 33 Mo. 212; *Wiseman v. Railroad Co.*, 1 Hilt. (N. Y.) 300.

¹¹² *Gandell v. Pontigny*, 4 Camp. 375, 1 Starkie, 198; *Strauss v. Meertief*, 64 Ala. 299; *Isaacs v. Davies*, 68 Ga. 169.

the contract, to recover for services rendered and damages for the breach, or general assumpsit for the services rendered, and that one action is a bar to any other.¹¹³ So long as the relation of master and servant actually continues, the servant may sue the master for each installment of wages as it becomes due.¹¹⁴

SAME—IN EQUITY—SPECIFIC PERFORMANCE—INJUNCTION.

258. Ordinarily, a suit cannot be maintained in equity to enforce performance of a contract of hiring, either directly, by decree for specific performance, or indirectly, by enjoining a threatened breach. But a promise not to serve elsewhere, and other negative promises, may be enjoined, if necessary to prevent irreparable injury.

A court of equity will not decree specific performance of a contract where the matter of the contract is such that it cannot supervise or insure its execution.¹¹⁵ It will not, therefore, decree specific performance of a contract of hiring, for it could not, from the nature of the contract, insure execution of its decree.¹¹⁶ Such

¹¹³ *Elderton v. Emmens*, 6 C. B. 160; *Goodman v. Pocock*, 15 Q. B. 576; *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246; *Howard v. Daly*, 61 N. Y. 362; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501; *Richardson v. Machine Works*, 78 Ind. 422; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Willoughby v. Thomas*, 24 Grat. (Va.) 521; *Jones v. Dunton*, 7 Ill. App. 580. Thus, where a servant who was engaged for a year at a fixed salary, payable monthly, was discharged at the end of two months, and sued for and recovered his salary up to that time, it was held that he could not afterwards sue for the breach of contract by the master, and recover for wages after the discharge. *Keedy v. Long*, *supra*.

¹¹⁴ *Clossman v. Lacoste*, 28 Eng. Law & Eq. 140; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704.

¹¹⁵ *Clark*, Cont. 701; *Fetter*, Eq. 267.

¹¹⁶ *Lumley v. Wagner*, 1 De Gex, M. & G. 616; *Webb v. England*, 29 Beav. 44; *Clark's Case*, 1 Blackf. (Ind.) 122; *Marble Co. v. Ripley*, 10 Wall. 339, *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *Wm. Rogers Manuf'g Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467; *Lindsay v. Glass*, 119 Ind. 301, 21 N. E. 897; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Camp-*

a suit would also be defeated in most cases by the principle that a suit for specific performance will not lie where there is an adequate remedy at law. Nor, for the same reasons, will a court of equity ordinarily enjoin the breach of a contract of hiring, and thus negatively or indirectly enforce specific performance of it.¹¹⁷ But where the contract contains negative promises, and a breach thereof would result in irreparable injury, a breach of such negative promises may be enjoined. Thus, a contract to serve another for a certain period, and not to serve any one else during that time, could not be specifically enforced by compelling the party to serve, or enjoining him from abandoning the employment; but he could be enjoined from serving any one else.¹¹⁸

RIGHTS, DUTIES, AND LIABILITIES INTER SE.

- 259. The master cannot chastise his servant.
- 260. The master is not bound to give the servant a character.
- 261. The master, in the absence of a special agreement to the contrary, is entitled to the entire time and services of the servant.
- 262. The servant is bound to exercise reasonable care not to injure his master's property, or property of others in his master's care.

bell v. Rust, 85 Va. 653, 8 S. E. 664. Thus, a person will not be compelled to perform his contract to sing at a theater. *Lumley v. Wagner*, *supra*.

¹¹⁷ *Fetter*, Eq. 296; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 318; *Wm. Rogers Manuf'g Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467; *Cort v. Lassard*, 18 Or. 221, 22 Pac. 1054; *Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986.

¹¹⁸ *Lumley v. Wagner*, 1 De Gex, M. & G. 616; *Cort v. Lassard*, 18 Or. 221, 22 Pac. 1054; *Daly v. Smith*, 49 How. Prac. 150; *McCaull v. Braham*, 16 Fed. 37; *Duff v. Russell* (Super. N. Y.) 14 N. Y. Supp. 134, 16 N. Y. Supp. 958; *Id.*, 133 N. Y. 678, 31 N. E. 622; *Hoyt v. Fuller* (Super. N. Y.) 19 N. Y. Supp. 962. In *Lumley v. Wagner*, *supra*, a professional singer was sued for specific performance of a contract to sing at complainant's theater on certain terms, and during a certain period to sing nowhere else. The court refused to enforce so much of the contract as related to the promise to sing, but enjoined a breach of the promise not to sing elsewhere.

263. A conspiracy between servants to injure the masters' business gives the master a right of action against them.
264. The master may justify a battery in defense of the servant, and vice versa.
265. It is the duty of the master to pay the servant the wages agreed upon, unless the servant has forfeited his right to them. By the better opinion, if the servant abandons the service without excuse, or is discharged for good cause, he forfeits the right to wages, even for the time he has served. Some courts, however, even in these cases, allow a recovery on the quantum meruit.

It has been said that the master may give moderate corporal correction to his servant, while employed in his service, for negligence or misconduct; but this doctrine has long ago become obsolete. If a master chastises his servant, whether the servant be an adult or a minor (other than an apprentice), he is guilty of an assault and battery; and he is not only liable to respond to the servant in damages, but is also liable to a criminal prosecution.¹¹⁹

No master is legally bound to give his servant a character.* If the master does make to a third person, in confidence, a communication in the nature of a character, such communication is prima facie privileged; and no action can be maintained by the servant against him on account of it, if made bona fide and without malice.†

¹¹⁹ 2 Kent, Comm. 260; Com. v. Baird, 1 Ashm. (Pa.) 267; Cooper v. State, 8 Baxt. (Tenn.) 324; Matthews v. Terry, 10 Conn. 455.

* Eversley, Dom. Rel. 940 (where the subject is discussed at length); Carroll v. Bird, 3 Esp. 201.

† Eversley, Dom. Rel. 940 et seq. (collecting English cases); Gardner v. Slade, 13 Q. B. 801; Toogood v. Spyring, 1 Crompton, M. & R. 181; Weatherston v. Hawkins, 1 Term R. 110; Missouri Pac. Ry. Co. v. Beebe, 2 Tex. Civ. App. 107, 21 S. W. 384. If the communications are false, and made maliciously, an action will lie. See Rogers v. Clifton, 3 Bos. & P. 587; Pattison v. Jones, 8 Barn. & C. 578, 3 Man. & R. 101; Kelly v. Partington, 4 Barn. & Adol. 700; Fountain v. Boodle, 3 Q. B. 5; McCauley v. Elrod (Ky.) 27 S. W. 867; Vallery v. State, 42 Neb. 123, 60 N. W. 347.

On a contract of hiring for a fixed compensation, the master, unless such a result is excluded by the terms of the agreement, is entitled to the entire time and services of the servant during the time for which he has engaged to work. If, during this time, he works for others, the compensation earned for such work belongs to the master.¹²⁰ This doctrine does not prevent the servant working for others outside of the hours for which the servant is engaged.¹²¹

The servant is always liable to his master for a violation of his duty whereby the master is injured. He is bound to perform the business of the master with due diligence and fidelity, and with the degree of skill usually possessed by persons of ordinary capacity engaged in the same business or employment; and if he fails in this duty, to the master's injury, he is liable to the master in damages.¹²² A servant is as much bound to exercise reasonable care not to injure the property of his master as he is to exercise such care in relation to the property of other persons, and if he fails in this duty he is liable to the master for the resulting damages.¹²³ In like manner, he is liable to the master for injury, caused by his negligence, to property of third persons, intrusted to the master, and for which the master is liable to such third persons; and it is not necessary that the claim of the latter against the master shall have been judicially enforced or determined before suit is brought against the servant.¹²⁴ If a servant uses in his own business property of his master, delivered to him for use in his master's business, he is liable to the master for the value of the use.¹²⁵

A conspiracy between servants to injure the master in his business gives the master a right of action against them for any dam-

¹²⁰ See *Leach v. Railroad Co.*, 86 Mo. 27; *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. 480; *Hoyt v. Fuller* (Super. N. Y.) 19 N. Y. Supp. 962.

¹²¹ *Wallace v. De Young*, 98 Ill. 638.

¹²² *Smith v. Foran*, 43 Conn. 244; *Brewer v. Wright*, 25 Neb. 305, 41 N. W. 159; *Child v. Detroit Manuf'g Co.* 72 Mich. 623, 40 N. W. 916; *Alpaugh v. Wood*, 53 N. J. Law, 638, 23 Atl. 261; *Mobile & M. Ry. Co. v. Clanton*, 59 Ala. 392; *Woodrow v. Hawving* (Ala.) 16 South. 720; *Prescott v. White*, 18 Ill. App. 322.

¹²³ *Mobile & M. Ry. Co. v. Clanton*, 59 Ala. 392; *Smith v. Foran*, 43 Conn. 244; *Walker v. Association*, 18 Q. B. 277.

¹²⁴ *Smith v. Foran*, 43 Conn. 244.

¹²⁵ *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. 480.

ages sustained by him. Thus, where 18 journeymen tailors, working for a merchant tailor, by conspiracy between them, stopped work simultaneously, and returned their work to him unfinished, and worthless in that condition, and he was unable to get others to finish the work, it was held that he might maintain an action against them for damages.¹²⁶

Master and servant have a right to defend each other, and either can justify a battery in defense of the other.¹²⁷

The Right to Wages.

Of course, a servant is entitled to recover his wages if he performs the contract of hiring. If he does not perform in full, he is nevertheless entitled to recover for the services rendered, if he has a legal excuse for nonperformance in full.¹²⁸ Thus, if either party dies before the end of the term, the wages may be recovered by or against his personal representative, as the case may be, for the services actually rendered.¹²⁹ So incapacitating illness excuses further performance, and past wages may be recovered.¹³⁰ The question of what operates as an excuse is explained in another section.¹³¹

In England, and in most of our states, contracts of hiring for a specified term are regarded as entire, and the servant is not allowed to recover for his services unless he alleges and proves full performance on his part; such performance being held a condition precedent to any liability on the part of the master. And it is therefore held that if a servant willfully abandons the service, without cause, before the end of the term, or if he is guilty of such a breach of the contract as justifies the master in discharging him, he cannot recover on an entire contract, even for the services actually rendered prior to the abandonment or discharge.¹³² If the

¹²⁶ Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739.

¹²⁷ 2 Kent, Comm. 261; 1 Bl. Comm. 429.

¹²⁸ Clark, Cont. 683, 684; Robinson v. Davison, L. R. 6 Exch. 269. He may recover if prevented by the master from performing in full. Blood v. Enos, 12 Vt. 625.

¹²⁹ Yerrington v. Greene, 7 R. I. 589.

¹³⁰ Fenton v. Clark, 11 Vt. 557; ante, p. 472, and cases there cited.

¹³¹ Ante, p. 472.

¹³² Lilley v. Elwin, 11 Q. B. 742; Cutter v. Powell, 6 Term R. 320; Ridgway v. Market Co., 3 Adol. & E. 171; Stark v. Parker, 2 Pick. (Mass.) 267;

contract is divisible, the rule is different. Other courts regard this doctrine as harsh, and, upon equitable principles, allow the servant, even in case of willful abandonment, or dismissal for cause, to recover on the quantum meruit for the services rendered. He has not performed on his part, and therefore he cannot recover on the contract; but the action is based on a contract implied, or rather created by law, because of the benefit received by the master from the services rendered.¹³³ In such an action the recovery is the reasonable value of the services, and not the contract price, but it cannot exceed the contract rate of compensation; and the master may, by counterclaim, set up any damages sustained by him by reason of the servant's breach.¹³⁴

Where there is no agreement as to the amount of compensation to be paid for services, the law implies an obligation to pay what they are reasonably worth.¹³⁵ If the rate of compensation, or a mode of determining the compensation, is fixed by the agreement, it must govern. It is competent for the parties to leave it

Olmstead v. Beale, 19 Pick. (Mass.) 528; *Miller v. Goddard*, 34 Me. 102; *Erving v. Ingram*, 24 N. J. Law, 520; *Mather v. Brokaw*, 43 N. J. Law, 587; *Curlee v. Reiger*, 45 Ill. App. 544; *Badgley v. Heald*, 4 Gilm. (Ill.) 64; *Hausell v. Erickson*, 28 Ill. 257; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621; *Nelichka v. Esterly*, 29 Minn. 146, 12 N. W. 457; *Kohn v. Fandel*, 29 Minn. 470, 13 N. W. 904; *Helm v. Wilson*, 4 Mo. 41 (but see, contra, *Lee v. Ashbrook*, 14 Mo. 378); *Timberlake v. Thayer*, 71 Miss. 279, 14 South. 446; *Hutchinson v. Wetmore*, 2 Cal. 310; *M'Millan v. Vanderlip*, 12 Johns. (N. Y.) 165; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Reab v. Moor*, 19 Johns. (N. Y.) 337; *Lantry v. Parks*, 8 Cow. (N. Y.) 63. If the servant is not guilty of any willful deviation from the terms of the contract, but fails to fulfill them, and has performed work beneficial to the master, he may recover on the quantum meruit. *Blood v. Enos*, 12 Vt. 625.

¹³³ *Britton v. Turner*, 6 N. H. 481; *Lee v. Ashbrook*, 14 Mo. 378; *Lowe v. Sinklear*, 27 Mo. 310; *Coe v. Smith*, 4 Ind. 79.

¹³⁴ *Taylor v. Paterson*, 9 La. Ann. 251; *Newman v. Reagan*, 63 Ga. 755; *Coe v. Smith*, 4 Ind. 79.

¹³⁵ *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316; *Ryan v. Dayton*, 25 Conn. 188; *Tucker v. Preston*, 60 Vt. 473, 11 Atl. 726; *Farrell v. Dooley*, 17 Ill. App. 66. Where the master agreed to pay "the same wages as shall be paid to other employes filling similar positions," and it does not appear that there were other men filling similar positions, the servant may recover what the services were reasonably worth. *Kent Furniture Manuf'g Co. v. Ransom*, 46 Mich. 416, 9 N. W. 454.

to the master—or, indeed, to the servant, either—to fix the compensation, after the services are rendered, at such a sum as he may think right and proper; and his determination as to the amount will be controlling, in the absence of fraud or bad faith.¹³⁰

SAME—MASTER'S LIABILITY FOR INJURIES TO SERVANT.

263. It is the duty of the master—which he cannot delegate, and for a breach of which he is liable to the servant, in the case of personal injuries—to use ordinary care—

- (a) To provide reasonably safe and suitable tools and appliances.
- (b) To provide reasonably safe premises.
- (c) To provide competent fellow servants, and a sufficient number of them.
- (d) To promulgate rules, where the nature of the work requires them.
- (e) To instruct and warn young and inexperienced servants.

267. The master is liable only for failure to exercise reasonable care in the performance of these duties. He is not an insurer.

268. On entering the service a servant impliedly contracts that he possesses the ordinary skill and experience of those engaged in the occupation he undertakes, that he will exercise ordinary care to protect himself while engaged in that occupation, and that he will assume the risks of the employment, including the risks arising from the negligence of fellow servants. But to this rule there are a number of exceptions.

¹³⁰ *Butler v. Mill Co.*, 28 Minn. 205, 9 N. W. 697; *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316. The mere fact that the master, under such an agreement, fixes the compensation at an amount considerably less than the court, upon the evidence, finds that the services were reasonably worth, is not of itself sufficient to justify an inference of fraud or bad faith. *Butler v. Mill Co.*, *supra*.

A master is under an obligation, implied in the contract of hiring, to use reasonable and ordinary care to provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the work will permit.¹³⁷ If he fails to perform this duty, and by reason of his neglect the servant is injured, he is liable in damages. As we shall see, ordinary care, and such care only, is required. A master does not insure the absolute safety of the tools and appliances furnished. He is bound to use ordinary care to provide appliances that are reasonably safe and suitable.¹³⁸ He is not bound to supply the best, safest, or newest.¹³⁹ The test is general use in the business.¹⁴⁰ He must keep his appliances in repair, and provide against liability to decay from age, or wear out from use;¹⁴¹ but this does not apply to appliances which the servant is employed to repair.¹⁴² He is not liable for hidden defects, which were unknown, and which could not have been discovered in the exercise of ordinary care.¹⁴³ He is not bound to provide against danger from an unnecessary or inappropriate use of appliances by the servant.¹⁴⁴

¹³⁷ *Bailey, Mast. Liab.* 2, 13; *Gibson v. Railroad Co.*, 46 Mo. 163; *Hough v. Railway Co.*, 100 U. S. 213; *Flike v. Railway Co.*, 53 N. Y. 549; *Cone v. Railway Co.*, 81 N. Y. 207; *Chicago & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; *Toledo, W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Railway Co.*, 110 Mass. 240; *Stephenson v. Duncan*, 73 Wis. 406, 41 N. W. 337.

¹³⁸ *Washington & G. R. Co. v. McDade*, 135 U. S. 571, 10 Sup. Ct. 1044; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Richardson v. Cooper*, 88 Ill. 270; *Marsh v. Chickering*, 101 N. Y. 400, 5 N. E. 56; *Lytle v. Railway Co.*, 84 Mich. 289, 47 N. W. 571.

¹³⁹ *Bailey, Mast. Liab.* 23 et seq.; *Lehigh & Wilkes-Barre Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387.

¹⁴⁰ Cases cited in preceding note; *Northern Cent. Ry. Co. v. Hussion*, 101 Pa. St. 1; *The Maharajah*, 40 Fed. 784; *Vinton v. Schwab*, 52 Vt. 614.

¹⁴¹ *Richardson v. Cooper*, 88 Ill. 270; *Chicago, K. & W. R. Co. v. Blevins*, 46 Kan. 370, 26 Pac. 687; *Indiana Car Co. v. Parker*, 100 Ind. 193; *Rapho v. Moore*, 68 Pa. St. 404.

¹⁴² *Murphy v. Railway Co.*, 88 N. Y. 146; *Howland v. Railway Co.*, 54 Wis. 226, 11 N. W. 529; *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497.

¹⁴³ *Columbus, C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545; *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533; *Guttridge v. Railway Co.*, 105 Mo. 520, 16 S. W. 943; *Hart v. Naumburg*, 123 N. Y. 641, 25 N. E. 385.

¹⁴⁴ *Chicago & A. R. Co. v. Mahoney*, 4 Ill. App. 262; *Chicago, B. & Q. R. Co. v. Abend*, 7 Ill. App. 130.

It is also one of the implied duties of the master to provide a suitable and reasonably safe place for the doing of the work to be performed by the servant, and to keep the premises in a reasonably safe condition.¹⁴⁵ Thus he may be liable for leaving dangerous machinery, such as cogwheels, knives, saws, etc., so exposed that it may cause injury, when it ought to be covered or protected,¹⁴⁶ or where, unknown to the servant, he allows stairways to remain in a dangerous condition.¹⁴⁷

It is also the implied duty of the master to provide other servants sufficient in number, and reasonably skilled and competent for the performance of the service, so that the servant will not be exposed to unnecessary risk from unskillful or incompetent fellow servants, or from a lack of a sufficient number of them.¹⁴⁸ If he knowingly employs or retains a careless person or drunkard, for instance, he may be liable if injury results to a fellow servant. If there is no negligence, there is no liability for injuries caused by an incompetent servant.¹⁴⁹

It is also the duty of a master, where the nature of his business requires it, as in the case of railroad companies, to promulgate rules for the protection of employes.¹⁵⁰

It is the master's duty to inform the servant of latent dangers, or dangers arising from extraneous causes, known to him, where

¹⁴⁵ *Bailey, Mast. Liab.* 2, 34; *Coombs v. Cordage Co.*, 102 Mass. 572; *Bessex v. Railway Co.*, 45 Wis. 477; *Swoboda v. Ward*, 40 Mich. 423; *Smith v. Car Works*, 60 Mich. 501, 27 N. W. 662; *Van Dusen v. Letellier*, 78 Mich. 502, 44 N. W. 572.

¹⁴⁶ *Nadau v. Lumber Co.*, 76 Wis. 128, 43 N. W. 1135.

¹⁴⁷ *Sweet v. Coal Co.*, 78 Wis. 127, 47 N. W. 182.

¹⁴⁸ *Bailey, Mast. Liab.* 3, 46; *Laning v. Railroad Co.*, 49 N. Y. 521; *Booth v. Railroad Co.*, 73 N. Y. 38; *Baulec v. Railway Co.*, 59 N. Y. 356; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; *Moss v. Railroad*, 49 Mo. 167; *Gilman v. Railway Corp.* 10 Allen (Mass.) 233; *Harper v. Railway Co.*, 47 Mo. 567; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 513; *Hilts v. Railway Co.*, 55 Mich. 440, 21 N. W. 878; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 179, 9 N. W. 243.

¹⁴⁹ *Columbus, C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545.

¹⁵⁰ *Bailey, Mast. Liab.* 71; *Slater v. Jewett*, 85 N. Y. 62; *Abel v. Canal Co.*, 103 N. Y. 581, 9 N. E. 325; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514.

the servant has no knowledge of them, and knowledge cannot be imputed to him.¹⁵¹ And he must inform the servant of obvious dangers, where the servant cannot be presumed to appreciate or understand them. This is peculiarly applicable to servants of tender years.¹⁵² It applies also, however, to inexperienced persons of mature years.¹⁵³ It is not enough to inform the servant generally that the service is dangerous, but the particular perils and dangers must be pointed out.¹⁵⁴ There is no duty to give information as to dangers which are known or obvious, and which he has a right to presume the servant understands.¹⁵⁵

In the performance of the above duties the master is bound, and only bound, to exercise ordinary care.¹⁵⁶ He is not an insurer of his servant's safety. The question arises, what is ordinary care? It was said in a late case, by the supreme court of the United States: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say

¹⁵¹ Bailey, Mast. Liab. 109 et seq.; *Coombs v. Cordage Co.*, 102 Mass. 572; *Baxter v. Roberts*, 44 Cal. 187.

¹⁵² *Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466; *Tagg v. McGeorge*, 155 Pa. St. 368, 26 Atl. 671; *Dowling v. Allen*, 74 Mo. 13; *Ford v. Anderson*, 139 Pa. St. 263, 21 Atl. 18; *Steiler v. Hart*, 65 Mich. 644, 32 N. W. 875; *Chopin v. Paper Co.*, 83 Wis. 192, 53 N. W. 452.

¹⁵³ *Fox v. Color Works*, 84 Mich. 676, 48 N. W. 203; *Chopin v. Paper Co.*, supra; *Parkhurst v. Johnson*, 50 Mich. 70, 15 N. W. 107.

¹⁵⁴ Bailey, Mast. Liab. 112.

¹⁵⁵ Bailey, Mast. Liab. 112, 118; *Smith v. Car-Works*, 60 Mich. 506, 27 N. W. 662; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 152, 5 N. E. 187; *Crowley v. Mills*, 148 Mass. 228, 19 N. E. 344; *Fones v. Phillips*, 39 Ark. 17.

¹⁵⁶ Bailey, Mast. Liab. 3, etc.; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Richardson v. Cooper*, 88 Ill. 270; *Devlin v. Smith*, 89 N. Y. 470.

whether the conduct of the parties in that case was such as should be expected of reasonably prudent men under a similar state of affairs."¹⁵⁷ "The rule," said the New York court, "is simple, practical, and easy of application. The question is, what would a majority of men of common intelligence have done under like circumstances? Ordinary care, skill, and diligence is such a degree of care, skill, and diligence as men of ordinary prudence, under similar circumstances, usually employ."¹⁵⁸

The master's duty to furnish suitable tools and appliances, and to keep them in repair, to provide and maintain a reasonably safe place for work, to promulgate reasonable rules, where they are required by the nature of the business, and to inform servants of hidden dangers, and instruct young or inexperienced servants, is personal, and he cannot delegate them. He may delegate the performance of them, but his responsibility remains.¹⁵⁹ There is considerable conflict between the courts in the application of this doctrine.¹⁶⁰

Assumption of Risk by Servant.

It is said that, when a person enters into the service of another, he impliedly contracts that he possesses the ordinary skill and experience of those engaged in the occupation which he undertakes, that he will exercise ordinary care to protect himself while engaged in that occupation, and that he will assume the risks of his employment.¹⁶¹ Mr. Jaggard, in his late work on Torts, thus states the general rules relating to the assumption of the risks of his employment by a servant.¹⁶² As he points out, the risks which the servant assumes may arise (a) from circumstances exclusive of the risk of fellow servants, and may be either (1) the ordinary

¹⁵⁷ Grand Trunk Ry. Co. v. Ives, 144 U. S. 417, 12 Sup. Ct. 679.

¹⁵⁸ Ernst v. Railroad Co., 35 N. Y. 9. And see Marsh v. Chickering, 101 N. Y. 400, 5 N. E. 56; Read v. Morse, 34 Wis. 318; Michigan Cent. R. Co. v. Coleman, 28 Mich. 448; Holly v. Gaslight Co., 8 Gray (Mass.) 131; Cayzer v. Taylor, 10 Gray (Mass.) 280; Vinton v. Schwab, 32 Vt. 612.

¹⁵⁹ Bailey, Mast. Liab. 128; Morton v. Railroad Co., 81 Mich. 433, 46 N. W. 111; Northern Pac. R. Co. v. Herbert, 116 U. S. 650, 6 Sup. Ct. 590; Laning v. Railroad Co., 49 N. Y. 521.

¹⁶⁰ Bailey, Mast. Liab. 128-141, where the doctrine is discussed at length. See post, p. 492.

¹⁶¹ 2 Jag. Torts, 1013 et seq.; Bailey, Mast. Liab. 142 et seq.

¹⁶² See 2 Jag. Torts, 1014 et seq.

risks of the employment; (2) the extraordinary risks of the employment; or (b) from the negligence of fellow servants.

Same—Ordinary Risks.

"Excluding the negligence of fellow servants, a servant assumes the ordinary risks of his employment, with the instrumentalities, in the place, and under the rules of work for which he is engaged, which are reasonably necessary and incidental to it, and which are apparent to ordinary observation: provided (a) he knew and appreciated, or should have known and appreciated, the risks and dangers, in the prudent exercise of his senses and common sense, regard being had to his age, capacity, and experience; and provided (b) the master has exercised reasonable care to prevent them."¹⁶³ If a piece of machinery is obviously dangerous, ordinarily, one who undertakes to work at it assumes the risk of injuries therefrom.¹⁶⁴ And, generally, if he works with machinery or tools which he knows, or should reasonably know, to be defective, and therefore dangerous, he assumes the risk.¹⁶⁵ The rule is the same where a servant works in a place which is obviously dangerous, or which he knows to be dangerous.¹⁶⁶

Same—Extraordinary Risks.

"The servant cannot recover from his employer for damages consequent upon extraordinary risks which he has knowingly as-

¹⁶³ See 2 Jag. Torts, 1014 et seq.

¹⁶⁴ Anderson v. Lumber Co., 47 Minn. 128, 49 N. W. 664; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; Prentiss v. Manufacturing Co., 63 Mich. 478, 30 N. W. 109; Chicago, B. & Q. R. Co. v. Merckes, 36 Ill. App. 195; United States Rolling Stock Co. v. Chadwick, 35 Ill. App. 474; O'Keefe v. Thorn (Pa. Sup.) 16 Atl. 737; Townsend v. Langles, 41 Fed. 919.

¹⁶⁵ Michael v. Stanley, 75 Md. 464, 23 Atl. 1094; Rietman v. Stolte, 120 Ind. 314, 22 N. E. 304; Way v. Railway Co., 40 Iowa, 341; Anderson v. Railroad Co., 39 Minn. 523, 41 N. W. 104; Shaw v. Sheldon, 103 N. Y. 667, 9 N. E. 183.

¹⁶⁶ 2 Jag. Torts, 1017; Bailey, Mast. Liab. 142 et seq.; McGrath v. Railway Co., 9 C. C. A. 133, 60 Fed. 555; Ragon v. Railway Co., 97 Mich. 265, 56 N. W. 612; Gibson v. Railway Co., 63 N. Y. 449; Feely v. Cordage Co., 161 Mass. 426, 37 N. E. 368; Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387.

sumed.”¹⁶⁷ A servant does not assume extraordinary risks unless he has actual or constructive knowledge of the danger.¹⁶⁸ But if he has such knowledge, and voluntarily undertakes the work, the risk is assumed.¹⁶⁹

Same—Exceptions to the Rule.

The principles under which a servant is held to assume the risks of the employment do not apply in the following cases:¹⁷⁰ (a) Where, though he may know of the defect or danger, he does not necessarily, and should not reasonably, know of or appreciate the consequent risk.¹⁷¹ (b) Where, without proper notice of increased risk, he is put to a service outside of, and more dangerous than, the employment for which he was engaged.¹⁷² (c) Where the master has promised to remove the peril,¹⁷³ unless the danger is so immediate and imminent that an ordinarily prudent man would not con-

¹⁶⁷ 2 Jag. Torts, 1019, 1020, and cases there cited.

¹⁶⁸ Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890.

¹⁶⁹ Goff v. Railway Co., 86 Wis. 237, 56 N. W. 465; Sullivan v. Railroad Co., 161 Mass. 125, 36 N. E. 751; Kelley v. Railway Co., 35 Minn. 490, 29 N. W. 173; Texas & P. Ry. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378; Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876; Smith v. Railroad Co., 42 Minn. 87, 43 N. W. 968.

¹⁷⁰ The following statements are taken in substance from 2 Jag. Torts, 1021.

¹⁷¹ Coombs v. Cordage Co., 102 Mass. 572; Mellor v. Manufacturing Co., 150 Mass. 362, 23 N. E. 100; Steen v. Railroad Co., 37 Minn. 310, 34 N. W. 113; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573.

¹⁷² Consolidated Coal Co. v. Haenni, 48 Ill. App. 115, affirmed 146 Ill. 614, 35 N. E. 162; Railroad Co. v. Fort, 17 Wall. 553. But “if a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes such duties knowing their dangerous character, although unwillingly, and from fear of losing his employment, and he is injured, he cannot maintain an action for the injury.” Leary v. Railroad Co., 139 Mass. 580, 2 N. E. 115. A servant who goes into hazardous work outside his contract voluntarily, and without direction from the master, assumes the risk. Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Prentiss v. Manufacturing Co., 63 Mich. 478, 30 N. W. 109.

¹⁷³ Hough v. Railway Co., 100 U. S. 213; Chicago Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 337, 36 N. E. 1024; Greene v. Railway Co., 31 Minn. 248, 17 N. W. 378. There must be a clear promise to repair. A complaint and an acknowledgment of the defect are not enough. Breig v. Railway Co.,

tinue in the service.¹⁷⁴ (d) Even in the latter case, the risk will not be assumed if the duty to continue in the dangerous service is required or justified by some emergency approved by law.¹⁷⁵ (e) Where the servant does not voluntarily expose himself to the peril.¹⁷⁶

Same—Negligence of Fellow Servants.

Among the ordinary risks of the service which are assumed by a servant, as between himself and his master, is the risk of negligence upon the part of a fellow servant. The leading case in this country is *Farwell v. Boston & Worcester Railroad Corp.*,¹⁷⁷ decided in the supreme court of Massachusetts in 1842, in which it was held that a master is not liable to his servant for an injury due to the negligence of a fellow servant engaged in the same general employment, where he has used due diligence in the selection of such fellow servant, and has furnished to his employé suitable means for carrying on the business in which they are engaged.

When we seek for a rule which will determine when the relationship of fellow servants exists, so as to exempt the master from liability, we meet with a hopeless conflict in the decisions. It is impossible to state any rule that will apply in all the states, or even in any considerable number of them. There is no question in the law of master and servant upon which there is greater conflict and confusion in the cases. Not even are the decisions of the same court always consistent.

98 Mich. 222, 57 N. W. 118; *Chesapeake, O. & S. W. R. Co. v. McDowell* (Ky.) 24 S. W. 607; *Wilson v. Railroad Co.*, 37 Minn. 326, 33 N. W. 908; *Mahan v. Clee*, 87 Mich. 161, 49 N. W. 556.

¹⁷⁴ *Greene v. Railway Co.*, 31 Minn. 248, 17 N. W. 378; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231.

¹⁷⁵ 2 Jag. Torts. 1027; *Lalor v. Railway Co.*, 52 Ill. 401; *Moore v. Railway Co.*, 85 Mo. 588; *Strong v. Railway Co.* (Iowa) 62 N. W. 799.

¹⁷⁶ 2 Jag. Torts. 1028. As where a seaman obeys the orders of his superior officer, being required by statute to do so, *Eldridge v. Steamship Co.*, 134 N. Y. 187, 32 N. E. 66; or where a convict works in a dangerous place, under control and orders of a guard, *Chattahoochee Brick Co. v. Braswell*, 92 Ga. 631, 18 S. E. 1015; or where a servant, by the wrong of the master, is placed in a position of imminent peril, and necessarily adopts a dangerous means of escaping therefrom, *Louisville & N. R. Co. v. Shivell's Adm'r* (Ky.) 18 S. W. 944.

¹⁷⁷ 4 Metc. (Mass.) 49.

In order that the rule may apply, it is necessary that the servants shall have a common master. It is not enough for the employment to be the same, if the masters are different.¹⁷⁸ If a master lends or hires his servant to another for a particular employment, he becomes, as to that employment, a servant of the person to whom he is lent or hired, and a fellow servant of the servants of such person.¹⁷⁹

A person who, without any employment, voluntarily undertakes to perform services for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant, for the time being, and is to be regarded as assuming all the risks incident to the business, including the risk of injuries from the negligence of fellow servants.¹⁸⁰

"The English courts determine the relationship of fellow servants by the test of common employment. * * * The American cases incline to adopt, as the test of whether the plaintiff and another servant are fellow servants of the same master, the doctrine of vice principal. A vice principal, as distinguished from a fellow servant, is one to whom the master has delegated some

¹⁷⁸ 2 Jag. Torts, 1033, 1034; *Sullivan v. Railroad Co.*, 112 N. Y. 643, 20 N. E. 569; *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092; *Kelly v. Johnson*, 128 Mass. 530; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544. The rule, for instance, does not apply to servants of different masters, working on the same building. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Burrill v. Eddy*, 160 Mass. 198, 35 N. E. 483. So, servants of different railroad companies, operating connecting lines, are not within the rule. *Sullivan v. Railroad Co.*, *supra*; 2 Jag. Torts, 1035, and cases there cited. So, also, the servants of a man are not the fellow servants of the servants of an independent contractor employed by him on a piece of work. *Coughtry v. Woolen Co.*, 56 N. Y. 124; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Goodfellow v. Railroad Co.*, 106 Mass. 461; 2 Jag. Torts, 1036, and cases cited.

¹⁷⁹ *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759; *Cregan v. Marston*, 126 N. Y. 573, 27 N. E. 952; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20.

¹⁸⁰ There are some cases against this doctrine, or apparently so. It is supported, however, by the great weight of authority. *Street Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333; *Mayton v. Railway Co.*, 63 Tex. 77; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Flower v. Railroad Co.*, 69 Pa. St. 210; *Osborne v. Railroad Co.*, 68 Me. 49. This doctrine applies

absolute duty owed by the master to his servants. For the negligence of such vice principal,—at least, so long as he is engaged in the performance of such duty,—the master is responsible to other servants.”¹⁸¹ It is the well-established rule that the duty which a master owes his servant to furnish safe premises and appliances, and competent fellow servants, and to promulgate proper rules, is a personal duty, of which he cannot relieve himself by delegating it to an agent or employé. If he intrusts this duty to a servant, he makes him, to that extent, a vice principal, and not a fellow servant, of the other servants. If the servant intrusted with such duties is negligent in the performance of them, and injury thereby results to another servant, the negligence is that of the master, and he is liable. Thus far the courts in this country agree. But when we go a step further we meet with a conflict in the decisions of the various courts.

In New York this doctrine is made the test of the relation of fellow servant, and the rank or grade of the negligent servant is immaterial. It is said in a leading New York case: “The liability of the master does not depend upon the grade or rank of the employé whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. On the same principle, however low the grade or rank of the employé, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employé. * * * The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employé performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the man-

to volunteers only. It does not apply to passengers or shippers, or their servants, assisting the employés of a carrier to remove impediments to travel, or to expedite delivery of goods. *Wright v. London & N. W. R. Co.*, 1 Q. B. Div. 252; *Street Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333; *Eason v. Railway Co.*, 65 Tex. 577. But see *Potter v. Faulkner*, 1 Best & S. 800.

¹⁸¹ 2 Jag. Torts, 1036, 1037. And see *Bailey, Mast. Liab.* 226-393, where the question is considered at length, and the doctrine in each state set forth.

ner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employé performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant, for its improper performance."¹⁸²

This doctrine is recognized, with some variations, in most states. All the courts agree to so much of the doctrine as holds that a master who intrusts a personal duty to a servant makes that servant, *pro hac vice*, a vice principal, and that he is liable to the other servants for his negligence in the performance of those duties.¹⁸³ Most courts also hold that if the duty which the master

¹⁸² *Crispin v. Babbitt*, 81 N. Y. 516. And see *McCosker v. Railroad Co.*, 84 N. Y. 77; *Slater v. Jewett*, 85 N. Y. 74; *Brick v. Railroad Co.*, 98 N. Y. 211.

¹⁸³ See the dictum in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, and the cases hereafter cited in this note. Employés intrusted with furnishing safe premises and machinery and appliances are not fellow servants with those who use them, so as to exempt the master from liability for their negligence; but in respect to this duty they stand in the place of the master, and are vice principals. *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Shanny v. Androscoggin Mills*, 66 Me. 420, 426; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094; *Brown v. Gilchrist*, 80 Mich. 56, 45 N. W. 82; *Cadden v. American Steel-Barge Co.*, 88 Wis. 409, 60 N. W. 800; *Lawless v. Railroad Co.*, 136 Mass. 1; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 315; *Nixon v. Lead Co.*, 102 Cal. 458, 36 Pac. 803; *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957. Most courts apply the same rule to employés intrusted with repairs of premises or appliances. *Fuller v. Jewett*, 80 N. Y. 46; *Corcoran v. Holbrook*, 59 N. Y. 517; *Shanny v. Androscoggin Mills*, *supra*; *Roux v. Lumber Co.*, 94 Mich. 607, 54 N. W. 492; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Lewis v. Railroad Co.*, 59 Mo. 495; *Tierney v. Railway Co.*, 33 Minn. 311, 23 N. W. 229; *Calvo v. Railroad Co.*, 23 S. C. 526; *Davis v. Railroad Co.*, 55 Vt. 84; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745. The Massachusetts court holds that employés intrusted with ordinary repairs are fellow servants of the employés who use the premises or appliances. *Johnson v. Towboat Co.*, 135 Mass. 211; *McGee v. Cordage Co.*, 139 Mass. 445, 1 N. E. 745; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574; *Mellen v. Thomas Wilson Sons & Co.*, 159 Mass. 88, 34 N. E. 96. But even in Massachusetts the master is required to use reasonable care and supervision to see that repairs are made when needed by those to whom he intrusts the duty. *Rogers v. Manufacturing Co.*, 144

delegates to a servant is not one of his own personal duties, but a duty which may be so delegated, he is not to be held liable to his other servants for that servant's negligence in performing it; for as to such a duty the servant is to be regarded as their fellow

Mass. 204, 11 N. E. 77; *Babcock v. Railway Co.*, 150 Mass. 470, 23 N. E. 325. An employé to whom the master intrusts the duty of determining where the other employés are to work is a vice principal, and not their fellow servant in the performance of this duty, and the master is liable to the other servants for the negligence of such servant in not keeping the premises in a safe condition. *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074. So, also, it is held in some states, perhaps in most, that the duty of inspection, like that of repair, is one which the master cannot delegate so as to be exempt from liability for the negligence of the employé to whom he intrusts it; and that an inspector of premises, machinery, and appliances is not a fellow servant with those who use them. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Fay v. Railway Co.*, 30 Minn. 231, 15 N. W. 241; *Tierney v. Railway Co.*, 33 Minn. 311, 23 N. W. 229; *Macy v. Railroad Co.*, 35 Minn. 200, 28 N. W. 249. In other states it is held that a master performs his duty when he furnishes a competent inspector, and that the negligence of the inspector causing injury to another employé is the negligence of a fellow servant. *Mackin v. Railroad Co.*, 135 Mass. 201; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Dewey v. Railway Co.*, 97 Mich. 329, 56 N. W. 756. An employé intrusted with the duty of employing competent servants, and a sufficient number of them, is, as to such duty, a vice principal, and not a fellow servant of the other employés. *Laning v. Railroad Co.*, 49 N. Y. 521; *Flike v. Railroad Co.*, 53 N. Y. 549; *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596; *Cheaney v. Steamship Co.*, 92 Ga. 726, 19 S. E. 33; dictum in *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240. Thus, where an engineer, having authority, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employés by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes to its employés to exercise ordinary care in providing and retaining competent servants. *Core v. Railroad Co.*, *supra*. The duty to promulgate necessary and proper rules, as to promulgate time-tables of a railroad, is the master's duty; and, if he delegates it to a servant, the latter is a vice principal in respect to such duty. *Slater v. Jewett*, 85 N. Y. 61; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514. In the latter case the employé was a train dispatcher, vested with authority to change the schedule time, and make new time-tables; and he was held a vice principal as to train hands. And in a late New York case it was held that the train dispatcher of a division, who, in directing the movements of two trains, which are being run entirely on special orders, makes a mis-

servant, whatever may have been his relative grade or rank.¹⁸⁴ The difficulty, as is shown by the illustrations given in the note, is in determining, in the application of this doctrine, whether the duty in the performance of which the servant was negligent was or was not one which the master could delegate.

If the master intrusts the entire conduct and control of his business, or a part of it, to an employé, the latter stands in the master's place, and is not to be regarded as a fellow servant of the other employés. "Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision, except the master's) over the action of the employés engaged in carrying on a particu-

take, whereby the trains collide, is a vice principal as to the employés on the trains. *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466. And see, to the same effect, *Little Rock & M. R. Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502; *Darrigan v. Railroad Co.*, 52 Conn. 285. Contra, *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994; *Robertson v. Railroad Co.*, 78 Ind. 77.

¹⁸⁴A railroad company may delegate the duty of running its trains, and, under the doctrine above stated, it will not be liable to a brakeman or fireman, or to any other employé riding or working on a train, for the negligence of the conductor or engineer. They are all fellow servants. *Slater v. Jewett*, 85 N. Y. 61; *Russell v. Railroad Co.*, 17 N. Y. 134; *Hayes v. Railroad Corp.*, 3 Cush. (Mass.) 270; *Capper v. Railroad Co.*, 103 Ind. 305, 2 N. E. 749; *Thayer v. Railroad Co.*, 22 Ind. 26; *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021; *Ellington v. Lumber Co.*, 93 Ga. 53, 19 S. E. 21; *Howland v. Railway Co.*, 54 Wis. 226, 11 N. W. 529; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Nashville, C. & St. L. R. Co. v. Wheless*, 10 Lea (Tenn.) 741. And see *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. But compare this case with *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184. Compare, also, *Mobile & O. R. Co. v. Massey*, 152 Ill. 144, 38 N. E. 787. See, also, the following cases, in which the employés were held fellow servants: Mate and common sailor upon a merchant vessel, *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; foreman or other superior employé and laborer under him, *Duffy v. Upton*, 113 Mass. 544; *Moody v. Manufacturing Co.*, 159 Mass. 70, 34 N. E. 185; *Gonsior v. Railway Co.*, 36 Minn. 385, 31 N. W. 515; *Olson v. Railway Co.*, 38 Minn. 117, 35 N. W. 886; *Brown v. Railroad Co.*, 27 Minn. 162, 6 N. W. 484; *Hauna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Di Marcho v. Iron Foundry*, 18 R. I. 514, 28 Atl. 661; *Lawler v. Railroad Co.*, 62 Me. 463; *Stutz v. Armour*, 84 Wis. 623, 54 N. W. 1000; *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219; *Johnson v. Water Co.*, 77 Wis. 51, 45 N. W. 807; *Peschel v. Railway Co.*, 62 Wis. 338, 21

lar branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employés to obey, then he stands in the place of the master, and is not a fellow servant with those whom he controls."¹⁸⁵ Such an employé, it has been said, is not a servant at all, but an agent.

In a few states the New York doctrine is not recognized, but, on the contrary, the rank or grade of the negligent servant, and not merely the scope of his duties and nature of the act or omission, is considered, in determining his character. It is held in these states that if one servant is placed in control of the others, as a foreman, for instance, he does not occupy the relation of their fellow servant. "No service is common," said the Ohio court in applying this doctrine, "that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other."¹⁸⁶ The supreme court of the United States

N. W. 269; *Dube v. City of Lewiston*, 83 Me. 211, 22 Atl. 112; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Peterson v. Mining Co.*, 50 Iowa, 674.

¹⁸⁵ *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502. And see *Corcoran v. Holbrook*, 59 N. Y. 517; *Sheehan v. Railroad Co.*, 91 N. Y. 332; *Pantzar v. Mining Co.*, 99 N. Y. 368, 2 N. E. 24; *Taylor v. Railway Co.*, 121 Ind. 124, 22 N. E. 876; *Mitchell v. Robinson*, 80 Ind. 281; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Mullan v. Steamship Co.*, 78 Pa. St. 25; *Chicago Anderson Pressed-Brick Co. v. Sabkowiak*, 148 Ill. 573, 36 N. E. 572; *Brothers v. Cartter*, 52 Mo. 373; *Dobbin v. Railroad Co.*, 81 N. C. 446.

¹⁸⁶ *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. The leading case holding this doctrine is *Little Miami R. Co. v. Stevens*, 20 Ohio, 415. *Berea Stone Co. v. Kraft*, 31 Ohio St. 291; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Newport News & M. Val. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 14 S. W. 958; *Miller v. Railway Co.*, 109 Mo. 350, 19 S. W. 58; *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Chicago, St. P., M. & O. Ry. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198. And see *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610. Thus, according to this doctrine, it is held that a foreman in charge of hands engaged in a particular piece of work is not their fellow servant in respect to such work. *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St. 221; *Miller v. Railway Co.*, 109 Mo. 350, 19 S. W. 58; *Chicago, St. P., M. & O. Ry. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198. And it is held that a conductor having control of a train is not a fellow servant of the brakeman, fireman, or engineer. *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E.

seems to have laid down this doctrine, in the Ross Case, decided in 1884, and its decision was so construed by the other courts;¹⁸⁷ but in the Baugh Case, decided in 1893, the contrary doctrine was recognized and affirmed.¹⁸⁸

In England, and in most of the states in this country, servants of the same master, engaged in carrying forward the same common enterprise, are regarded as fellow servants, within the meaning of the general rule, although they may be in different and widely-separated departments. The rule "is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty."¹⁸⁹ In Illinois, and several of the

467; *Little Miami R. Co. v. Stevens*, supra; *Cleveland, C. & C. R. Co. v. Keary*, supra; *Hauey v. Railway Co.*, 38 W. Va. 570, 18 S. E. 748; *Newport News & M. Val. Co. v. Dentzel's Adm'r*, supra; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Miller v. Railway Co.*, supra; *Illinois Cent. R. Co. v. Spence*, supra.

¹⁸⁷ *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184. In this case, approving the Ohio and Kentucky decisions, it was held that the conductor and engineer of a railroad train were not fellow servants. Mr. Justice Field delivered the opinion in this case. Mr. Justice Bradley, Mr. Justice Matthews, Mr. Justice Gray, and Mr. Justice Blatchford dissented.

¹⁸⁸ *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. In this case it was held, purporting to distinguish the Ross Case, supra, that the engineer and fireman of a train were fellow servants, though the rules of the company declared that the engineer, under the circumstances, should also be regarded as a conductor. Mr. Justice Brewer delivered the opinion in this case. Mr. Chief Justice Fuller and Mr. Justice Field dissented.

¹⁸⁹ *Holden v. Railroad Co.*, 129 Mass. 268; *Farwell v. Railroad Corp.*, 4 Mete. (Mass.) 49; *Adams v. Iron Cliffs Co.*, 78 Mich. 288, 44 N. W. 270; *Lawler v. Railroad Co.*, 62 Me. 463; *Doughty v. Log-Driving Co.*, 76 Me. 145; *Rose v. Railroad Co.*, 58 N. Y. 217; *Jenkins v. Railroad Co.*, 39 S. C. 507, 18 S. E. 182; *Neal v. Railroad Co.*, 57 Minn. 365, 59 N. W. 312. Accordingly, it has been held that the following employés are fellow servants: Locomotive engineer or conductor and switchman, *Farwell v. Railroad Corp.*, supra; workmen in repair shop of railroad, who are being carried on a train, and a flagman or switchman. *Gilman v. Railroad Corp.*, 10 Allen (Mass.) 233; laborers on railroad tracks or bridges and engineers or conductors of train, whether the former are injured while being carried on the

other states, the rule is different; and servants employed by the same master, and in the same general enterprise, are not regarded as being fellow servants, within the rule exempting the master, unless their duties are such as to bring them into personal association, or unless they are actually co-operating at the time of the injury. If they are in entirely separate and distinct departments, the courts of these states apply the doctrine of respondeat superior, and hold the master liable.¹⁹⁰

In a number of states, statutes known as "Employers' Liability Acts" have been enacted, defining the liability of a master for injuries to one employé from the negligence of another, and establishing rules different in some respects from the rules established by the courts in the absence of a statute. In Massachusetts, for instance, a superintendent was regarded as a fellow servant of the employés under him; but in 1887 the employers' liability act made employers liable for an injury to an employé from the negligence of a superintendent.¹⁹¹ And in some states employers are made liable for the negligence of a superior officer or agent.¹⁹²

train, or while at work on the road or bridge, *Seaver v. Railroad Co.*, 14 Gray (Mass.) 466; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Russell v. Railroad Co.*, 17 N. Y. 134; *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021; *Schaible v. Railway Co.*, 97 Mich. 318, 56 N. W. 565; founder in a blast furnace, having charge of the inside work of the furnace, and the engineer of a locomotive used by the same company in moving cars on its premises, *Adams v. Iron Cliffs Co.*, 78 Mich. 288, 44 N. W. 270; brakeman and car inspector, the latter being injured by the negligence of the former, *Potter v. New York, etc., R. Co.*, 136 N. Y. 77, 32 N. E. 603. As to the rule where the inspector is negligent, see ante, p. 492, note 181. Brakeman and men who make up trains. *Thyng v. Railroad Co.*, 156 Mass. 16, 30 N. E. 169.

¹⁹⁰ *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302 (collecting the Illinois cases, and reviewing the doctrine); *Union Pac. Ry. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347; *Peoria, D. & E. Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *Louisville, E. & St. L. Consol. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534; *Schlereth v. Railway Co.*, 115 Mo. 87, 21 S. W. 1110; *Card v. Eddy* (Mo. Sup.) 24 S. W. 746; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.

¹⁹¹ See *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Davis v. Railroad Co.*, 159 Mass. 532, 34 N. E. 1070; *O'Brien v. Rideout*, 161 Mass. 170, 36 N. E. 792.

¹⁹² *Evans v. Railway Co.*, 70 Miss. 527, 12 South. 581.

RIGHTS OF MASTER AS AGAINST THIRD PERSONS.

269. The master may recover from third persons for any damage he may have suffered by reason of their wrongful interference with his relationship to the servant, either by enticing the servant away, abducting or harboring him, by inflicting personal injuries upon him, or falsely imprisoning him, or otherwise depriving the master, in whole or in part, of his services.

Whenever a servant is knowingly enticed ¹⁹³ from his master's service, the master may maintain an action of trespass on the case per quod servitium amisit against the enticer; and such an action will also lie at common law against one who harbors a servant, knowing that he has wrongfully left his master. A master may also maintain an action against one who willfully, as by an assault and battery, or false imprisonment, or negligently, inflicts personal injury upon his servant, resulting in loss of service to the master, or by any other wrong causes such loss of service.¹⁹⁴

¹⁹³ "It is a material and necessary allegation that the defendant knew, at the time of enticing, employing, or harboring, that the party enticed away, employed, or harbored was the servant of the plaintiff, or that he afterwards had notice thereof, and continued to employ or harbor the servant after such notice. And such knowledge or notice must be proved in order to support the action." *Butterfield v. Ashley*, 6 Cush. (Mass.) 249. And see *Caughey v. Smith*, 47 N. Y. 244.

¹⁹⁴ 1 Jag. Torts, 448. Enticing away servant, *Keane v. Boycott*, 2 H. Bl. 511; *Lumley v. Gye*, 2 El. & Bl. 216; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475, and note therein at pages 485-490; *Salter v. Howard*, 43 Ga. 601; *Walker v. Cronin*, 107 Mass. 555; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322; *Woodward v. Washburn*, 3 Denio (N. Y.) 369; *Caughey v. Smith*, 47 N. Y. 244; *Jones v. Blocker*, 43 Ga. 331; *Haskins v. Royster*, 70 N. C. 601; *Duckett v. Pool*, 33 S. C. 238, 11 S. E. 689; *Milburne v. Byrne*, 1 Cranch. C. C. 239, Fed. Cas. No. 9,542. Abduction of servant, *Sherwood v. Hall*, 3 Sumn. 127, Fed. Cas. No. 12,777; *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11,233. Preventing a person from entering the service of another by menaces and threats or other unlawful means, *Walker v. Cronin*, 107 Mass. 555. Harboring another's servant, *Blake v. Lanyon*, 6 Term R. 221; *Sherwood v. Hall*, 3 Sumn. 127, Fed. Cas. No. 12,777; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322.

It has been said that this doctrine was confined, at common law, to menial or domestic servants and apprentices; and under this view it has been held that, as laborers employed by a man to work his crops for a share therein are not menial servants, the master cannot maintain an action for loss of service against one who injures such an employé.¹⁹⁵ The weight of authority, however, is against this view. The Massachusetts court, referring to the master's right of action for enticing away his servant, said: "It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment."¹⁹⁶ To entitle a master to recover from one who injures or entices away his servant, it is sufficient to show a subsisting relation of service, even though it may be determinable at will.¹⁹⁷ To induce—but not maliciously—a servant to leave his master's service when the time for which he has hired himself shall expire is not actionable, though the servant may have previously had no intention of leav-

But in Massachusetts it is held that one who does nothing to entice a servant to leave his master's employment does not become liable to the master for employing him after he has left of his own accord. *Butterfield v. Ashley*, 6 Cush. (Mass.) 249, 2 Gray (Mass.) 254. Seduction or debauching of female servant, *Edmondson v. Machell*, 2 Term R. 4; *Moran v. Dawes*, 4 Cow. (N. Y.) 412. Willfully or negligently causing personal injury to servant, *Ames v. Railway Co.*, 117 Mass. 541; *Fluker v. Banking Co.*, 81 Ga. 461, 8 S. E. 529. False arrest and imprisonment of servant, *St. Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570; *Woodward v. Washburn*, 3 Denio (N. Y.) 369. The statute of frauds, while it may be a good defense in an action by either of the parties on a verbal contract of hiring for a longer period than a year, is no defense in an action by the master against a third person for enticing away the servant. *Duckett v. Pool*, 33 S. C. 238, 11 S. E. 689. Nor is the infancy of the servant any defense, since he alone is entitled to avoid the contract on that ground. *Keane v. Boycott*, 2 H. Bl. 511.

¹⁹⁵ *Burgess v. Carpenter*, 2 S. C. 7; *Huff v. Watkins*, 15 S. C. 82. But see *Daniel v. Swearengen*, 6 S. C. 297.

¹⁹⁶ *Walker v. Cronin*, 107 Mass. 555. And see *Haskins v. Royster*, 70 N. C. 601; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, Id. 601; *Daniel v. Swearengen*, 6 S. C. 297.

¹⁹⁷ *Keane v. Boycott*, 2 H. Bl. 511; *Evans v. Walton*, L. R. 2 C. P. 615; *Haskins v. Royster*, 70 N. C. 601.

ing.¹⁹⁸ If a third person maliciously, and not in the exercise of any right which the law gives him, procures a servant to break his contract and leave his master, or even to leave an employment at will, and damage thereby results to the master, the latter may maintain an action against the wrongdoer.¹⁹⁹

RIGHTS OF SERVANT AGAINST THIRD PERSONS.

270. A servant may maintain an action against a third person for causing his discharge, if he acted gratuitously and maliciously, and damage has resulted, but not otherwise.

A man may withhold his trade from another, or even break a contract with him, for the reason that he employs a certain person, and if the employé is discharged he has no cause of action against such person for causing his discharge; for a man does not become liable for injury to another, caused by an act which he has a legal right to do.²⁰⁰ But a man cannot maliciously and wantonly interfere with another's rights without rendering himself liable for resulting damage. As a master has a right of action against one who maliciously induces his servant to leave him, so, also, it is held that an action will lie on behalf of a servant against a person who has maliciously procured the master to discharge him from employment under a legal contract. And it has been further held that the fact that no contract, nor any legal right of the servant against the master, is violated by the master, or that no action will lie by the servant against the master for the discharge, does not prevent a recovery against the third person for maliciously procuring the discharge, if it would not have occurred but for such procurement.²⁰¹

¹⁹⁸ *Boston Glass Manufactory v. Binney*, 4 Pick. (Mass.) 425.

¹⁹⁹ *Bowen v. Hall*, 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & Bl. 216; *Walker v. Cronin*, 107 Mass. 555; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934 (collecting the cases).

²⁰⁰ *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934. See *Heywood v. Tillson*, 75 Me. 225.

²⁰¹ *Chipley v. Atkinson*, *supra* (collecting cases); *Lally v. Cantwell*, 40 Mo. App. 44.

MASTER'S LIABILITY TO THIRD PERSONS.

271. The master is liable to third persons on contracts entered into by the servant in his name, or on his behalf, if he expressly or impliedly authorized the contract, or if he subsequently ratified it, but not otherwise.
272. The master is liable for frauds and wrongs committed by the servant, if expressly or impliedly directed or authorized by him, or if committed by the servant in the course of the employment, but not otherwise. To render one liable under this rule the relation must be that of master and servant, and not that of employer and independent contractor.

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master.²⁰² As to this proposition there can be no doubt. But there is much difficulty when we come to determine what acts on the part of the servant are to be deemed authorized by the master, for the authority may be either express or implied.

On Contracts by the Servant.

The liability of the master on contracts entered into by the servant depends upon principles of the law of agency. If he is liable at all upon a contract made on his behalf by his servant, it must be either because he authorized the servant to make the contract, or ratified it when made. Without this there can be no liability.²⁰³ The master is liable, of course, whenever he has given the servant an express authority to contract. He is also liable if he has impliedly authorized the servant, as by holding him out as

²⁰² 2 Kent, Comm. 259.

²⁰³ Clark, Cont. 717; *President, etc., of Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599.

having authority.²⁰⁴ He is also liable if he ratifies the servant's act in contracting without authority.²⁰⁵

For the Servant's Torts.

If the servant does an injury fraudulently or wrongfully, while in the immediate employment of the master, and in the course of such employment, the master, as well as the servant, is liable therefor, even though the wrongful act may have been done contrary to the master's orders.²⁰⁶ And if an injury results from the negligence or want of skill of the servant, while acting within the scope of his employment, the master, as well as the servant, is liable.²⁰⁷ "In one sense, where there is no express command by the master,

²⁰⁴ Clark, Cont. 717; *Morey v. Webb*, 58 N. Y. 350; *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155.

²⁰⁵ Clark, Cont. 719, and cases there cited.

²⁰⁶ 2 Kent, Comm. 259; *Limpus v. London General Omnibus Co.*, 1 Hurl. & C., 528; *Whatman v. Pearson*, L. R. 3 C. P. 422; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; *Drew v. Railroad Co.*, 26 N. Y. 49; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; *Evans v. Davidson*, 53 Md. 245; *Mound City Paint & Color Co. v. Conlon*, 92 Mo. 221, 4 S. W. 922; *Harris v. Louisville, N. O. & T. R. Co.*, 35 Fed. 116; *Driscoll v. Carlin*, 50 N. J. Law, 28, 11 Atl. 482; *Lee v. Lord*, 76 Wis. 582, 45 N. W. 601; *French v. Cresswell*, 13 Or. 418, 11 Pac. 62; *Eichengreen v. Railroad Co. (Tenn.)* 34 S. W. 219. But see *Andrews v. Green*, 62 N. H. 436. The fact that signal torpedoes, negligently placed on a railroad track by trainmen, who were authorized to use them in the management of the train, were put there when there was no necessity for doing so, and contrary to the rules of the company, does not exempt the company from liability to one who is injured thereby. *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451.

²⁰⁷ *Evans v. Davidson*, 53 Md. 245. In this case, a general farm hand, working in his master's cornfield, undertook, in his master's absence, and without express direction, to drive out a neighbor's cow, which had broken into the field, and, in doing so, negligently struck her with a stone, and killed her. The master was held liable. And see the cases cited in the preceding note. So, where a master sent his servant to do certain grubbing, and the servant set a fire to facilitate his work, the master was held liable for the consequences of the servant's negligence. *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715. See, also, the following cases, in which a master was held liable for injuries caused by the negligence of his servant: *Pike v. Brittan*, 71 Cal. 159, 11 Pac. 890; *French v. Cresswell*, 13 Or. 418, 11 Pac. 62; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Scammon v. City of Chicago*, 25 Ill. 424; *Andrews v. Boedecker*, 126 Ill. 605, 18 N. E. 651; *Cosgrove v. Ogden*, 49 N. Y. 255.

all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown."²⁰⁸ If the servant, in committing the wrong, is not acting in the course of his employment, the master is not answerable.²⁰⁹ The difficulty is in determining, in particular cases, whether the servant was or was not so acting. The test of a master's responsibility for the act of his servant is whether the act was done in the prosecution of the master's business, not whether it was done in accordance with the instructions of the master to the servant. When, therefore, the servant, while engaged in the prosecution of the master's business deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts.²¹⁰

²⁰⁸ *Evans v. Davidson*, 53 Md. 245.

²⁰⁹ *Stone v. Hills*, 45 Conn. 44. In this case the defendants had ordered their teamster to deliver a wagon load of paper to one T., in Glastonbury four miles distant, and to return by way of Nipsic with a load of wood. On reaching T.'s, the teamster was requested by T. to carry the paper to Hartford, four and a half miles further, and, at the railway station there to get some freight of T.'s, and bring it to him. The teamster consented, and, while he was paying the freight bill at the station, the team, being left unfastened, ran away, and injured the plaintiff's property. It was held that the teamster was not engaged in the defendants' employment at the time of the injury, and the defendants were not liable. And see *Mitchell v. Crassweller*, 13 C. B. 237; *Sheridan v. Charlick*, 4 Daly (N. Y.) 338; *Cavanagh v. Dinsmore*, 12 Hun (N. Y.) 465. Mere deviation from the route ordered by the master in these and similar cases (running a boat, for instance) is not departure from the employment. See *Quinn v. Power*, 87 N. Y. 535. For other illustrations of injuries caused by servants when not acting in the course of their employment, see *Wilson v. Peverly*, 2 N. H. 548; *Flower v. Railroad Co.*, 69 Pa. St. 210; *Snyder v. Railroad Co.*, 60 Mo. 413; *Mall v. Lord*, 39 N. Y. 381; *McClenaghan v. Brock*, 5 Rich. (S. C.) 17; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

²¹⁰ *Cosgrove v. Ogden*, 49 N. Y. 255. It was said in this case: "If the owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot, where no one would

In *M'Manus v. Crickett*,²¹¹ a leading English case, it was held, in substance, that the master is not liable for an injury willfully committed by his servant while engaged in the master's business, without the direction or assent of the master. In that case it was held that a master was not liable in trespass for the willful act of his servant in driving the master's carriage against another without the master's direction or assent. Lord Kenyon said that when the servant quitted sight of the object for which he was employed, and, without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed, so far, a willful abandonment of his master's business. This doctrine is very generally recognized in this country, but the courts do not always agree in applying it to particular cases.²¹² If the act for which it is sought to hold the master liable was in fact done by the servant in the course of his employment, the fact that he acted willfully and maliciously will not prevent liability from attaching to the master. As was said by the Ohio court: "Where a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If

be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because it was done in the business of the master. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant, to effect some purpose of his own." In *Garretzen v. Duenckel*, 50 Mo. 104, a clerk in the gun store, while engaged during the proprietor's absence, in exhibiting a gun to a customer, loaded it, contrary to the proprietor's orders. In doing so, it was accidentally discharged, and shot and wounded a person on the opposite side of the street. The proprietor was held responsible.

²¹¹ 1 East, 106.

²¹² *Foster v. Bank*, 17 Mass. 508; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 478; *Fraser v. Freeman*, 43 N. Y. 566; *Isaacs v. Railroad Co.*, 47 N. Y. 122; *Cox v. Keahey*, 36 Ala. 340; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Tuller v. Voght*, 13 Ill. 277; *Oxford v. Peter*, 28 Ill. 434.

the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master.”²¹³ It has repeatedly been held that if the conductor or other employés on a railroad train or on a boat unlawfully assault and injure a passenger, or even a trespasser, the railroad company or owner of the boat is liable, notwithstanding the servant acted willfully and from personal and malicious motives.²¹⁴ His conduct is none the less in the course of his employment because of his motive. The rule would be different if the conductor or brakeman on a railroad train should willfully and maliciously assault or otherwise injure a mere stranger, to whom the company owed no duty at all.²¹⁵ A railroad company has been held liable for injuries caused by the wrongful act of its locomotive engineer

²¹³ *Passenger R. Co. v. Young*, 21 Ohio St. 518.

²¹⁴ *Passenger R. Co. v. Young*, *supra*; *Bryant v. Rich*, 106 Mass. 180; *Sherley v. Billings*, 8 Bush (Ky.) 147; *Rounds v. Railroad Co.*, 64 N. Y. 129; *Shea v. Railroad Co.*, 62 N. Y. 180; *Higgins v. Railroad Co.*, 46 N. Y. 23; *Hoffman v. Railroad Co.*, 87 N. Y. 25; *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546; *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522; *Goddard v. Railway Co.*, 57 Me. 202; *Hanson v. Railway Co.*, 62 Me. 84; *McKinley v. Railroad Co.*, 44 Iowa, 314; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155; *Carter v. Railway Co.*, 98 Ind. 552. In *Craker v. Railway Co.*, 36 Wis. 657, a railroad company was held liable where its conductor kissed a female passenger against her will. In *Isaacs v. Railroad Co.*, 47 N. Y. 122, the plaintiff, while a passenger on a street car, and wishing to alight, passed out upon the platform, and asked the conductor to stop the car, telling him she would not get out until the car should come to a full stop. The conductor thereupon, while the car was in motion, threw her from the car with great violence, breaking her leg. It was held that this was a wanton and willful trespass, for which the company was not liable. This case was severely criticised, and has been, in effect, overruled by the later New York cases. See *Hoffman v. Railroad Co.*, 87 N. Y. 25; *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319; *Shea v. Railroad Co.*, 62 N. Y. 180.

²¹⁵ *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Marion v. Railroad Co.*, 59 Iowa, 428, 13 N. W. 415; *Central Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709; *Williams v. Car Co.*, 40 La. Ann. 87, 3 South. 631.

in blowing the whistle, or allowing steam to escape, and thereby frightening horses, though he acted willfully and maliciously.²¹⁶

Relation of Master and Servant must Exist.

The person by whom the injury was caused must have been the servant of the person whom it is sought to charge, and in his employ, at the time of the injury.²¹⁷ It is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment was of such a character as to create the relation of master and servant between them. "Unless the relation of master and

²¹⁶ Toledo, W. & W. Ry. Co. v. Harmon, 47 Ill. 298; Chicago, B. & Q. R. Co. v. Dickson, 63 Ill. 151; Nashville & C. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52.

²¹⁷ See Sawyer v. Martins, 25 Ill. App. 521; Marsh v. Hand, 120 N. Y. 315, 24 N. E. 463. "It is not necessary that he should be shown to have been in the general employment of the defendant, nor that he should be under any special engagement of service to him, or entitled to receive compensation from him directly. It is enough that at the time of the accident he was in charge of the defendant's property by his assent and authority, engaged in his business, and, in respect to that property and business, under his control. The fact that there is an intermediate party, in whose general employment the person whose acts are in question is engaged, does not prevent the principal from being held liable for the negligent conduct of the subagent or underservant, unless the relation of such intermediate party to the subject-matter of the business in which the underservant is engaged be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor." Kimball v. Cushman, 103 Mass. 194. And see Ewan v. Lippincott, 47 N. J. Law, 192. If the master hires the services of his servant to another temporarily, but retains control, he remains the master, and is liable for the acts of the servant in the course of the employment; and it can make no difference that the services of this particular servant were requested by the third party. This question arises where a person hires a team from another, together with the driver. Ordinarily, the driver remains the servant of the owner of the team. See Quarman v. Burnett, 6 Mees. & W. 499; Joslin v. Ice Co., 50 Mich. 516, 15 N. W. 887; Blake v. Ferris, 5 N. Y. 48; Norris v. Kohler, 41 N. Y. 42; Crockett v. Calvert, 8 Ind. 127; Huff v. Ford, 126 Mass. 24; Hershberger v. Lynch (Pa. Sup.) 11 Atl. 642; Muse v. Stern, 82 Va. 33.

servant exists, the law will not impute to one person the negligent act of another.”²¹⁸ As has heretofore been pointed out, a mere volunteer may, by assisting the servants of another in the service of the master, either at the request or without the request of such servants, stand in the relation of a servant for the time being, and may be regarded as assuming all the risks incident to the business.²¹⁹ Whether or not such a volunteer becomes a servant, so that the master of the other servants will be liable for his wrongful acts or negligence in the course of the employment, must depend upon the authority of the other servants to thus employ assistance. If they had such authority, express or implied, the master is liable; otherwise he is not.²²⁰

Independent Contractors.

There is a wide difference between a servant and an independent contractor. If a person contracts with another, who is engaged in an independent employment, for the doing of certain work by the latter, but does not personally interfere or give directions respecting the manner of the work, the relationship of master and servant does not exist, but the party employed is an independent contractor. “If one renders service, in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment.”²²¹ The fact that the contractor

²¹⁸ *King v. Railroad Co.*, 66 N. Y. 181.

²¹⁹ *Ante*, p. 491.

²²⁰ See *Althorf v. Wolfe*, 22 N. Y. 355.

²²¹ *Harrison v. Collins*, 86 Pa. St. 153. And see *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor, etc.*, 8 N. Y. 222; *King v. Railroad Co.*, 66 N. Y. 181; *Marsh v. Hand*, 120 N. Y. 315, 24 N. E. 463; *Scammon v. City of Chicago*, 25 Ill. 424; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *Kepperly v. Ramsden*, 83 Ill. 354; *Schwartz v. Gilmore*, 45 Ill. 455; *Moore v. Sanborne*, 2 Mich. 519; *Barry v. City of St. Louis*, 17 Mo. 121; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691. Whether a person employed to do certain work is to be regarded as a servant or as an independent contractor depends mainly upon whether, under the contract, the employer retains the power of directing and controlling the work. Where the employé is put in exclusive possession, and has exclusive control, furnishing his own assistants, and executing the work in detail, clear of any supervision, he is an independent contractor. It is otherwise if the em-

is paid by the day does not necessarily destroy the independent character of the employment.²²²

It is well settled, both in England and in this country, that a person who employs an independent contractor to do work for him is not liable for the wrongful acts or neglect of the contractor or his servants in the performance of the work, where the work to be done under the contract is lawful.²²³ In *Harrison v. Collins* ²²⁴ the defendants, owners of a sugar refinery, had employed a rigger to remove machinery from a railroad car to their refinery. In doing the work he opened a coal hole in the sidewalk, and left it open a few minutes after finishing the work, and a child fell into it and was injured. It appeared that the defendants neither directed nor interfered with the manner of the work, and it was therefore held that, as the rigger was an independent contractor, they

ployer retains the direction and control of the work. See the cases above cited. In *Harrison v. Collins*, *supra*, the owners of a sugar refinery employed a rigger to remove machinery from a railroad car to their refinery; but, though they paid him by the day, they neither interfered with nor directed the manner of the work. It was held that the rigger was an independent contractor, and not a servant. Among other employes who have been held to be independent contractors may be mentioned: A public licensed drayman, employed to haul goods, *De Forrest v. Wright*, 2 Mich. 368; a contractor employed to erect a building, *Hilliard v. Richardson*, 3 Gray (Mass.) 349; a plumber employed to repair water pipes, *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329; contractor employed by railroad company to build road, or to grade, *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562. A person employed by a railroad company to clear off and burn brush and rubbish from its right of way, at a certain sum per mile, who hires, pays, and controls his own help, is not a servant of the company, but an independent contractor. *St. Louis, I. M. & S. Ry. Co. v. Yonley* (Ark.) 13 S. W. 333.

²²² *Harrison v. Collins*, *supra*; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Corbin v. Mills*, 27 Conn. 274.

²²³ *Reedie v. Railway Co.*, 4 Exch. 244; *Harrison v. Collins*, 86 Pa. St. 153; *Cuff v. Railroad Co.*, 35 N. J. Law, 17; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *King v. Railroad Co.*, 66 N. Y. 181; *Blake v. Ferris*, 5 N. Y. 48; *Stevens v. Armstrong*, 6 N. Y. 435; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755; *Eaton v. Railway Co.*, 59 Me. 520; *De Forrest v. Wright*, 2 Mich. 368; *Clark v. Railroad Co.*, 28 Vt. 103; *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329.

²²⁴ 86 Pa. St. 153.

were not liable for the injury. On the same principle, it has been held that one who employs a public, licensed drayman to haul a lot of barrels of goods is not liable for injuries inflicted by the latter by rolling a barrel against a person.²²⁵ And the owner of land, who employs an independent contractor to erect or repair a building on his lot, is not liable for injuries resulting from the contractor's deposit of planks in the highway, or other negligence on the part of the contractor or his servants.²²⁶

If the work contracted for is unlawful, as where it naturally constitutes or creates a public nuisance, then the rule exempting the employer does not apply, but both the employer and the contractor are liable for injuries resulting therefrom.²²⁷ Thus, if a person who is not authorized to excavate in a highway employs a contractor to do so, he is liable for injuries inflicted by the contractor in doing the work, though he would not be so liable if he had first obtained a license to excavate.²²⁸

Nor does the rule apply where a public duty is imposed by law upon a public officer or public body, and the officer or body charged with the duty commits its performance to another. For instance, a municipal corporation charged by statute with the duty to keep the streets in repair cannot escape liability for a negligent performance of this duty on the ground that the immediate negligence was that of a contractor who had been intrusted with its performance.²²⁹

SERVANT'S LIABILITY TO THIRD PERSONS.

273. A servant is not personally liable to third persons on contracts made by him in the name or on behalf of the master, unless he failed to disclose the existence of his principal, or contracted without authority.

²²⁵ *De Forrest v. Wright*, 2 Mich. 368.

²²⁶ *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *McCarthy v. Second Parish*, 71 Me. 318; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Pearson v. Cox*, 2 C. P. Div. 369.

²²⁷ *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartmann*, 29 N. Y. 591.

²²⁸ *Creed v. Hartmann*, *supra*.

²²⁹ *King v. Railroad Co.*, 66 N. Y. 181; *Storrs v. City of Utica*, 17 N. Y. 104.

274. A servant is ordinarily personally liable to third persons for torts committed by him, though committed by his master's direction. But he is not liable to third persons for mere nonfeasance.

Ordinarily a servant is not personally liable on authorized contracts entered into by him in the name of his master, or on his behalf.²³⁰ It is otherwise if he contracts without disclosing either his agency,²³¹ or if he exceeds his authority.²³² The liability depends upon principles of the law of agency, and is not different from the liability of any other agent.

A servant is liable for criminal acts committed by him, though his master may have commanded him to commit them. In such a case both would be liable. In like manner a servant, as well as the master, is civilly liable for a tort committed by the servant by the master's command. "Although there are some cases which favor the idea that a servant is not liable for a wrong act, when done by order of his master, these cases, I apprehend, are not law. The idea that a command by a superior is to be admitted as a justification for an injury is admissible only in the case of a wife who does an injury by the command and in the company of her husband. A servant is bound to perform the lawful commands of his master, but not those which are unlawful. Such a principle would justify a servant in committing any crime. Even if the servant be ignorant that he is committing any injury, yet, if the thing done is an injury, he is liable, though done by the command of the master."²³³ The servant is not personally liable to third persons for mere nonfeasance. In such a case he is liable to the master, and the master alone is liable to third persons.²³⁴ But for negligence,

²³⁰ Clark, Cont. 737; *Jefts v. York*, 4 Cush. (Mass.) 371; *Bailey v. Cornell*, 66 Mich. 107, 33 N. W. 50.

²³¹ Clark, Cont. 740, 742, and cases there cited; *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24; *Holt v. Ross*, 54 N. Y. 472; *Wheeler v. Reed*, 36 Ill. 81; *Porter v. Day*, 44 Ill. App. 256; *Hubbard v. Ten Brook*, 124 Pa. St. 291, 16 Atl. 817; *Welch v. Goodwin*, 123 Mass. 71.

²³² Clark, Cont. 738, and cases there cited.

²³³ Reeve, Dom. Rel. (4th Ed.) 455.

²³⁴ *Delaney v. Rochereau*, 34 La. Ann. 1123; *Carey v. Rochereau*, 16 Fed. 87; *Albro v. Jaquith*, 4 Gray (Mass.) 99. But this case was afterwards over-

as distinguished from mere nonfeasance, the servant is personally liable.²⁸⁵

ruled in *Osborne v. Morgan*, *infra*, on the ground that the facts did not bring it within the principle. The principle itself, however, was conceded in the latter case.

²⁸⁵ *Osborne v. Morgan*, 130 Mass. 102. It was held in this case, overruling *Albro v. Jaquith*, 4 Gray (Mass.) 99, that a servant is personally liable to a third person for negligence in so placing appliances as to cause injury to him. The case overruled had erroneously held that a servant was not liable for unskillfully and negligently allowing inflammable gas to escape. In *Osborne v. Morgan*, the court, by Gray, C. J., said: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance; but it is misfeasance, doing improperly." And see *Parsons v. Winchell*, 5 Cush. (Mass.) 592; *Bell v. Josselyn*, 3 Gray (Mass.) 309; *Nowell v. Wright*, 3 Allen (Mass.) 166; *Horner v. Lawrence*, 87 N. J. Law, 46; *Hinds v. Overacker*, 66 Ind. 547.

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